SUPREME COURT OF FLORIDA

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

Petitioners,

Case No. SC03-127

vs.

District Court of Appeal,
5th District—No. 5D01-2114

EARL BAUMLE,

Respondent.
_____/

REPLY BRIEF OF PETITIONERS

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PRELIMINARY STATEMENT

The Petitioners will be referred to as "Petitioner." Respondent will be referred to as "Respondent." The record from the trial court will be cited by reference to the volume and page number, as follows: (R.1__) The Supplemental Record will be referred to as: (SR.__)

ARGUMENT

The Trial Court Committed Reversible Error in Permitting Respondent to Conduct Post-trial Discovery as to His Affirmative Defense of PIP Benefits Setoff

This Court should answer the first certified question in the affirmative. The trial court's ruling permitting post-trial discovery involves a matter of statutory interpretation, and the standard of review is de novo. See Racetrac, Inc. Delco Oil, Inc., 721 So.2d 376, 377 (Fla. 5th DCA 1998)("[J]udicial interpretation of Florida statutes is purely a legal matter and therefore subject to de novo review."]

This Court has jurisdiction to decide the questions the lower tribunal certified. Respondent contends that "there was no issue in the trial court as to whether section 627.736(3) required evidence of PIP benefits to be submitted to the jury." See Answer Brief at p. 12. This contention is based upon a response that Petitioner's attorney made to the trial court when asked whether he intended to submit evidence of PIP payments to the jury. Petitioner's counsel answered: "absolutely not."[1] (SR. 795) He could hardly has stated otherwise, as putting this evidence before jury was not his burden. Rather, it was the defendant's burden to submit this evidence to prove up his affirmative defense.

[1] Respondent views this dialogue as showing Petitioner's counsel "strenuously objected" to the jury's consideration of PIP payments.

Respondent's view of the constitutional authority of this Court under Article V is incorrect. Once the district court certifies a question, the jurisdictional requirement is completed. As this Court stated in Susco Car Rental System of Florida v. Leonard, 112 So.2d 832-835 (Fla. 1959):

> the language of Article V does not, on its face, leave the point open to contest in this forum. Our jurisdiction in this class of cases is that we 'may review by certiorari any decision of a district court of appeal that passes upon a question certified by the district court of appeal to be of great public interest.' (Emphasis supplied.) Certification is plainly a condition precedent to any review here upon this ground. . . . Similarly, where a decision involves a question which has, incontrovertibly, been 'certified by the district court of appeal to be of great public interest,' then the specified condition has been fully met. No review or redetermination of the point is necessary or even proper unless by some stretch of reasoning the exercise of the power of certification could be found reviewable under related clauses defining other areas of appellate jurisdiction of this Court. (Emphasis supplied.)

In this case, the question before the Court has, "incontrovertibly, been certified by the district court of appeal to be of great public importance." Accordingly, "[n]o review or redetermination of the point is necessary or even proper. . . ." This notion is within "the traditional policy of this Court to fully dispose of a case once jurisdiction vests in the Court." Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982).

Respondent states that Petitioner never discussed section 627.736(3) at trial, that the trial court never ruled as to the statute and that Petitioner waived the right to raise it now. Even the trial court judge would not agree with these claims, as he

acknowledged at the August 15, 2000, hearing that Petitioner's counsel had properly and timely objected at trial as to the admissibility of the PIP payout sheets. (R2. 279-281; 286-288) The lower tribunal agreed, and cited excerpts from the trial transcript which showed that Petitioner's attorney properly preserved the issues now before the Court. See Caruso v. Baumle, 835 So.2d 276-278 (Fla. 5th DCA 2003).

Respondent inaccurately states on page 17 of his Answer Brief that "[s]ection 627.736(3) was never raised as a basis for Petitioners' objection at trial." Respondent has not cited that part of the record[2] where Petitioner actually handed the trial court Marion v. Cissell, 376 So.2d 871 (Fla. 5th DCA 1979), a case which sets out section 627.736(3) in full. It is here that Petitioner told the trial court he would hold Respondent to proving up his defense of PIP benefit payoff at trial:

> Mr. Byrd: Here is what disturbs me, Your honor, and I will show you the statute But the statute–Defense attorneys, and I am not faulting Ms. Paquette, but they often misread the collateral source offset.
>
> The Court: This case that you're citing [Marion v. Cissell] is talking about about a jury instruction. The jury is instructed to deduct $5,000.00, and they are saying that was not part of the-there was no evidence of this to instruct

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[2] On page 18 of his Answer Brief, Respondent points to a reference Petitioner's attorney made at trial to "the statute." (SR. 796) Even though no statute was specifically cited, Respondent incorrectly infers that this comment referred to section 768.76. That said, Petitioner has consistently maintained that mere calculation of PIP setoff based on evidence admitted at trial may occur post-trial.

the jury.

Mr. Byrd: Well, you are correct, that is a jury instruction, but it is because the defense failed to put in that material in evidence and they could not make the instruction.

The Court: Yeah. But we can't tell the jury anything about the PIP. We are not going to tell them anything about the PIP.[3]

Mr. Byrd: And Your Honor can't do the calculations unless that evidence is put in for Your Honor's consideration

The Court: It's not going to be done tomorrow, that's what I am talking about.

Mr. Byrd: But see, Your Honor, that is my point. It must be done tomorrow, not at some subsequent trial date. The defense must prove up their affirmative defenses at trial. (Emphasis added.)

(SR. 798-800). Marion concerns and discusses section 627.736(3) in detail. In Marion, a trial court incorrectly gave an instruction based on 627.736(3) even though no evidence of PIP benefits payments had been introduced at trial:

> No effort was made by the defendants, by pleadings or proof, to show they were entitled to a credit for personal injury benefits paid or payable. Nevertheless, the court, relying on Section 627.736(3), Florida Statutes (1976), instructed the jury to deduct $5,000.00 from Mr. Marion's damages. This was error for several reasons.

Marion, 376 So.2d at 872. The appellate court then sets out in full the applicable text

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[3] This statement refutes any claim that the trial court would have permitted the jury to hear evidence of PIP benefits payments under any circumstances. Continuing to discuss the point only risked angering the court.

of section 627.736(3).

Petitioner's counsel cited Marion to show that the affirmative defense of PIP benefit set off had to be proven at trial. However, the trial court decided to ignore the Marion decision after stating, "we can't tell the jurors anything about the PIP. We are not going to tell them anything about the PIP." (SR. 799) The trial court judge simply refused to let the jury hear anything regarding PIP benefits even though the statutory authority which permitted this was before him.[4] The suggestion of Petitioner's attorney that proof of PIP benefit be submitted to the judge outside the presence of the jury (R2. 288) was perfectly within the purview of section 627.736(3), and could easily have been handled just as a motion in limine, directed verdict or any other matter which trial courts routinely address at trial outside of the jury's presence.

Respondent incorrectly states on page 24 of his Answer Brief that "Petitioners unequivocally agreed with the trial court that the PIP set off was a matter for the court to decide post-trial." Petitioner's attorney never agreed to such a procedure. He stated that the mathematical calculation of PIP benefits could be done after trial, but he never agreed to permit post-trial discovery or proof that his client received such

[4] Respondent's reliance on section 90.104(1)(a), Fla. Stat. (2000), is misplaced, as the objection of Petitioner's attorney was both timely and specific. The grounds for this objection are also apparent from the context of the record.

benefits. The parts of the record to which Respondent cites undercut his argument because therein Petitioner's attorney states, [b]ut the proof must be offered at trial, not subsequent to trial," and, "I am not intending on doing post-trial discovery." (SR. 797) The trial court's ruling prejudiced Petitioner. The Respondent should have been completely barred from asserting the PIP set off defense after he failed to properly introduce it into evidence at trial. Without the set off, the amount of Petitioner's judgment would have been greater since the PIP benefits she received could not have been deducted from it.

After omitting significant sections of section 627.736(3) from quotation in his Answer Brief at page 25, Respondent boldly concludes on page 26 that "[c]onstruing section 627.736(3) and 627.737(1) together, there is no clear legislative mandate that evidence of PIP benefits must be submitted at trial." But that conclusion is only possible if the part of section 627.736(3) which Respondent has brazenly omitted from discussion is entirely ignored. That section states:

> The plaintiff may prove all of his or her special damages notwithstanding this limitation, but if special damages are introduced into 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. (Emphasis added.)

While the statute enables either the judge or jury to deduct from a damages award PIP

benefits which have been "paid or payable," it also plainly envisions that the evidence supporting such deduction must be presented at trial, and only at trial. The context of the phrase "trier of fact" is that of a trial, and the statute's express discussion of the how special damages are to be handled at trial (as well as the limitations on such damages for both judge and jury), together with its mention of a jury and how that jury will be instructed show that the legislature intended that this defense must be proven up at trial. The statute is an alteration of the common law, and "the statutory provisions that allow the introduction into evidence and setoff of collateral insurance benefits must be narrowly construed." Rollins v. Pizzarelli, 761 So.2d 294, 300 (Fla. 2000). See also Allstate Ins. Co. v. Rudnick, 761 So.2d 289 (Fla. 2000).

It is also illogical to suggest that the statute creates one procedure where the defense must be proven at trial (i.e., when the jury is instructed regarding PIP setoff) and a separate post-trial procedure where the judge permits post-trial discovery and proof. If any other construction is possible, court should not construe a statute in such a manner that an absurd conclusion may be reached. State Dept. of Public Welfare v. Bland, 66 So.2d 59 (Fla. 1953). To construe section 627.736(3) to permit two different procedures as to the same affirmative defense would result in an absurd conclusion because it is so contrary to the what the statute expressly states. Indeed, one searches in vain for any mention in the statute of a post-trial procedure where

discovery and unfinished evidentiary matters are to occur.

Respondent's discussion of section 627.737(1), Florida Statutes only triggers the principle that a more specific statutory provision governs over a more general one. See McKendry v. State, 641 So.2d 45, 46 (Fla. 1994). The language of section 627.736(3) is plainly more specific to the issues in this appeal than the more general provisions of section 627.737(1), or, for that matter, any of the other statutory provisions Respondent has cited. Section 627.736(3) should therefore govern the issues in this appeal.

Respondent incorrectly argues that Gormley v. GTE Products Corp., 587 So.2d 455 (Fla. 1991), supports the broad contention that collateral source evidence need not be proffered at trial. Gormley was not a PIP case involving section 627.736(3). It was a suit against the manufacturer of a television set which allegedly caused the plaintiffs' house to burn down. To impeach the plaintiffs' damages claim, the defendant introduced an insurance claim document which showed a smaller amount of damages than that which the plaintiffs would later ask the jury to award. This Court found that it was error to admit evidence of the plaintiffs' insurance claim form because it could potentially mislead the jury to believe the plaintiffs had received a double recovery. That concern is not implicated here. Further, section 627.736(3) specifically provides that the "trier of fact will hear evidence of the PIP setoffs, be it

judge or jury, and that the jury will be instructed plaintiffs cannot recover such PIP benefits paid or payable." Caruso, 835 So.2d at 280. Nothing in Gormley purports to allow post-trial discovery as to affirmative defenses, nor does it prohibit the introduction of evidence at trial which this statute mandates.

Respondent's attempt to tie this Court's ruling in Rollins v. Pizzarelli, 761 So.2d 294 (Fla. 2000), to his construction of section 627.736(3) and 627.737(1) ignores the fact that Rollins establishes that section 627.736(3)–not section 627.737(1)–applies to the setoff of PIP benefits. See also McKenna v. Carlson, 771 So.2d 555 (Fla. 5th DCA 2000)(collateral source payment statute section 768.76(1) does not apply to setoff of PIP benefits). Section 627.731(1) is silent as to when the affirmative defense of PIP benefit setoff must be handled. Respondent apparently misconstrues this silence to permit post-trial discovery regarding PIP benefits setoff even though another more specific statute--section 627.736(3)--expressly provides that such proof must be handled at trial.

In her Initial Brief, Petitioner raised two main points in connection with the lower tribunal's decision in Allstate Co. v. Scott, 773 So.2d 1290 (Fla. 5th DCA 2001). The first point was that the language from Scott directing that the trial court should have conducted a post-trial collateral source hearing could not be reconciled with the 5th DCA's teaching in McKenna v. Carlson, 771 So.2d 555 (Fla. 5th DCA 2000), that

section 768.76(1) does not govern PIP setoffs. The second point was that Scott's sweeping sanction of post-trial discovery hearings regarding PIP setoffs is in direct conflict with this Court's decision in Rollins v. Pizzarelli, 761 So.2d 294 (Fla. 2000). Rollins establishes that section 627.736(3), rather than section 768.76, applies to the setoff of PIP benefits "paid or payable" at the time of trial–a time-sensitive determination.

Respondent does not take issue with either of these two points. He instead argues that he had no reason to anticipate authenticity objections at trial notwithstanding his having put the insurance records custodian on his witness list (R1. 46), and his having listed the PIP setoff as an "Issue of Fact" to be tried. (R1. 81) Respondent's position is ironic because he posed the affirmative defense of PIP setoff in his Answer wherein he demanded "trial by Jury of all issues so triable as a matter of right by Jury." (R1. 3b) Once requested, "[a] demand for jury trial may not be withdrawn without the consent of the parties." F.R.C.P. 1.430(d). Respondent then makes the strained argument that he was subjected to "gotcha" tactics at trial. This is a fable. He knew what objections to expect at trial, and he was responsible for knowing the Florida Rules of Evidence. Petitioner's objections based on Respondent's failure to adhere to these elementary rules, i.e., proper foundation and hearsay, hardly qualify as unseemly trial tactics. Petitioner's attorney had a

professional duty to make these objections.

Respondent suggests on page 43 of his Answer Brief that Petitioner should have put him "on notice before trial of any necessity to present testimony of any representative of the PIP carrier to authenticate records." Respondent posed the PIP setoff defense to reduce his liability. It was up to him to figure out how to properly prove it at trial under the rules of evidence in the absence of a stipulation. Respondent's comment that the "logs were authentic, Petitioners' counsel knew they were authentic" misses the point, which is that the logs were not self-authenticating. They had to be authenticated before they were admitted into evidence. The PIP payout sheets he sought to admit at trial were outdated (R2. 229), and that the trial court agreed they were improper and inadmissible. (R2. 279)

Respondent's discussion of Scott declines even further when he compares Scott's stipulation (and post-trial renunciation) to handle PIP setoff after trial by affidavit, to the Respondent's alleged reliance on the trial court's suggestion that it would handle this issue in the same way. This analogy fails because Respondent did seek to admit the PIP documents–without the proper foundation. In so doing, he clearly was not relying on the comments of the trial court. He knew he was acting at his peril if he did not try to admit such evidence. Florida courts have established that, [i]t has never been the role of the trial courts of this state to relieve attorneys of

their tactical mistakes. Godfrey v. Carlon, 760 So.2d 1064 (Fla. 4th DCA 2000). Respondent is therefore wrong in his contention that he was free to rely on an incorrect ruling by the trial court. Respondent's Answer Brief faults both counsel for Petitioner and the trial court to account for why he did not prove his defense at trial. Respondent has only himself to blame for this. His entire theory in this appeal is essentially an after-the-fact rationalization for a mistake he made in preparing for trial.

In her Initial Brief, Petitioner cited Barberena v. Gonzalez, 706 So.2d 60 (Fla. 1998), to support the conclusion that there is no entitlement to a PIP offset without sufficient, adequate proof at trial. In Barberena, the Third District Court of Appeal ruled that the defendants in that case were not entitled to a set-off because they failed to present evidence of collateral source payments at trial. As noted by the lower tribunal:

> In cases involving section 627.7371, the courts reversed setoffs where the defendants failed to present evidence of collateral source payments to the jury. Barberena; Kirkland. This principle should also apply to cases involving section 627.736(3). Logically, if the defendant neglects to present evidence of the plaintiff's benefits, the jury cannot be faulted for failing to consider those payments in its award.

Caruso, 835 So.2d 280. Petitioner cited Barberena because the decision reversed a setoff after noting that a defendant had not proven the defense of collateral source setoff at trial. The Respondent failed to do the same thing here, and he should be

similarly barred.

Respondent's discussion of Bogosian v. State Farm Mutual Automobile Ins. Co., 817 So.2d 968 (Fla. 3d DCA 2002), and Standard Jury Instruction 6.13 contains several inaccuracies. Respondent states on page 38 of his Answer Brief that, "Bogosian is consistent with the agreed procedure in this case that the court and not the jury should have made the PIP setoff." Again, the Petitioner in this case never agreed to a post-trial discovery procedure. Moreover, nothing in either Standard Instruction 6.13a or 6.13b provides for a post-trial procedure where discovery and proof of a PIP set off defense are belatedly established. Regardless, the Committee expressed no opinion on the correctness of instruction 6.13, and reminded all parties that they were free to request additional or alternative instructions. Respondent admits on page 39 of his Answer Brief that counsel did not stipulate before trial as to the admissibility of the PIP payout sheets. It does not matter whose fault this was. The point is that Respondent knew he had to prove up her defense at trial with admissible evidence.

Respondent is critical of Petitioner because she first tried to test the trial court's ruling by filing a Petition for Writ of Mandamus. Petitioner was concerned that if the trial court's ruling regarding discovery was not immediately challenged through some form of extraordinary writ, Respondent would later contend that he had waived the

right to subsequently test this point by plenary appeal. In light of Respondent's focus on alleged waiver throughout his Answer Brief, this concern now seems prescient. Petitioner filed a Petition for Writ of Mandamus and was unsuccessful. At the time Petitioner sought Mandamus, the Fifth District Court of Appeal had not yet decided Allstate v. Scott, 773 So.2d 1290 (Fla. 5th DCA 2001), wherein it noted that, "[t]he issue of a post-trial collateral source set-off can be raised on direct appeal." That decision established that for the first time that plenary appeal was the proper (and apparently only) vehicle by which collateral source setoff can be raised. Before Scott, however, this was not clear.

The second certified question should be answered in favor of Petitioner. Respondent fails to cite one statute that provides for post-trial discovery and proof as to the defense of PIP benefit set off. Petitioner could not have "implicitly agreed that the PIP setoff would be determined by the procedure set forth in section 768.76" when the statute does not itself provide such a procedure. Answer Brief at 17. (Emphasis added.) Again, both the trial court and the lower tribunal agreed that Petitioner repeatedly objected to any post-trial discovery procedure.

A defendant has the burden of proof as to affirmative defenses which avoid liability or reduce damages. Haycock v. Ostman, 397 So.2d 743 (Fla. 5th DCA 1981). Respondent's position contradicts this principle because it permits a trial court to

conduct a post-trial procedure–a procedure without guidance from statutes, case law or the Florida Rules of Civil Procedure as to critical issues such as deadlines for discovery completion. This creates a procedural no-man's land that this Court should not sanction. Respondent is dismissive that such post-trial discovery will create delays and maintains that these "horribles" are "unrealistic." What is unrealistic is the belief that defendants and insurance companies will not seek to use post-trial discovery to delay entry of final judgments. Final judgments cannot be entered until a PIP setoff is fully calculated, and this cannot happen until post-trial discovery on this point has been completed. This is the principal disadvantage of Respondent's proposed discovery scheme: it causes the entry of the final judgment to be delayed indefinitely. Interest does not begin to accrue until the date on which the judgment is entered--not the date of the verdict. Amerace v. Stallings, 823 So.2d 110 (Fla.2002). Accordingly, a defendant need not fear the accrual of interest[5] should delay in the entry of a judgment occur. When this is considered along with the axiom that affirmative defenses must be proven at trial or waived, and that a central purpose of trial is to achieve finality, it is clear that post-trial discovery as to the receipt of PIP benefits is legally unsupportable.

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[5] The trial court was therefore incorrect in stating that "[y]ou get interest from the date of the verdict." (SR. 800)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent by U.S. Mail this 17th day of July, 2003, to Elizabeth C. Wheeler, Esq., P.O. Box 2266, Orlando, FL 32802-2266, and Thomas R. Thompson, Esq., P.O. Box 15158 Tallahassee, Fl 32317.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210 (a)(2).

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