

SUPREME COURT OF FLORIDA

CASE NO. SC00-112

STATE FARM FIRE & CASUALTY COMPANY, Petitioner, vs. JUANA MARIA PEREZ, Respondent.		Lower Tribunal No. : 3D99-1481

PETITIONER’S REPLY BRIEF ON THE MERITS

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CERTIFICATE OF FONT STYLE AND SIZE

STATE FARM hereby certifies, in accordance with this court's Administrative Order of July 13th, 1998, that the style and size of the font utilized throughout this brief is 14 point Calisto MT, proportionately spaced.

POINT ON APPEAL

WHETHER A PERSONAL INJURY PROTECTION INSURANCE CARRIER IS REQUIRED TO PAY A MEDICAL BILL WHICH IS UNREASONABLE, UNNECESSARY, AND UNRELATED TO AN AUTOMOBILE ACCIDENT BECAUSE IT FAILED TO PHYSICALLY HAVE IN ITS POSSESSION, WITHIN THIRTY DAYS AFTER SUBMISSION OF THE BILL FOR PAYMENT, PROOF THAT THE BILL IS NOT PAYABLE UNDER PERSONAL INJURY PROTECTION COVERAGE?

ARGUMENT IN REPLY

The most eloquent reply to the arguments raised by the Respondent and her *amici* here has recently been articulated by Judges Klein, Hazouri and Polen of the Fourth District Court of Appeal in the recent decision in *AIU Insurance Company v. Daidone*, 25 Fla. L. Weekly D1625 (Fla. 4th DCA July 5th, 2000). There, on facts identical to the case *sub judice*, the court noted

We conclude that the thirty-day period in section 627.736(4) applies only to benefits which are reasonable and necessary as a result of the accident. Section 627.736(4), Florida Statutes begins with the words 'benefits due' and states in subsection (b) that 'personal injury protection benefits paid pursuant to this section shall be overdue if not paid within thirty days.' If the insured submits a bill for medical treatment which is not related

to the accident, there are no ‘benefits due.’ If benefits are not due, they cannot be ‘overdue.’ As we observed in a PIP case involving a different issue: ‘an insurer is not liable for any medical expense to the extent that it is not a reasonable charge for a particular service or if the service is not necessary.’ *Derius v. Allstate Indem. Co.*, 723 So. 2d 271, 272 (Fla. 4th DCA 1998).

The fourth district court, then, joins in the interpretation given section 627.736(4)(b), Florida Statutes, by the fifth district court in *Jones v. State Farm Mutual Automobile Insurance Company*, 694 So. 2d 165 (Fla. 5th DCA 1997), and urged upon this Court by the Petitioner. Both the fourth and fifth district courts have now clearly recognized that the PIP statute requires payment of only those expenses which are reasonable, necessary, and related to a car accident. They have found that the mere expiration of thirty days from the time that a bill was submitted for payment does not automatically make that bill “payable” under the statute. Rather they recognized that if a bill represents a *covered* expense, and is not paid within thirty days, the insurance company becomes subject to the statutory penalties provided by the legislature, *i.e.*, 10% interest per annum and attorney's fees, but does not lose the right to contest the validity of the expense submitted.

Reply to Respondent’s Arguments-in-Chief

Respondent and her *amici* essentially articulate three arguments in support of their position that the court below was correct in its narrow view that the PIP statute may sanction the payment of unreasonable, unnecessary expenses which may be unrelated to an accident. First, they seek comfort in the language of the statute to support their position. Next, they argue a line of cases which cite *dicta* from the case of *Dunmore v. Interstate Fire Insurance Company*, 301 So. 2d 502 (Fla. 1st DCA 1974), but which are distinguishable from the facts in this case. Finally, they argue that the interpretation of the plain language of the statute urged upon this court by Petitioner is contrary to the rationale of this court’s decision in *Lasky v. State Farm Insurance Company*, 296 So. 2d 9 (Fla. 1974).

a. The Plain Language of the Statute

Respondent and her *amici* fail to appreciate that prior to the enactment of Ch. 88-370, §19, Laws of Florida, section 627.736(4)(b) provided that “[p]ersonal injury protection benefits shall be overdue if not paid within 30 days...” Ch. 88-370 added important qualifying language so that, after enactment, that same section provided “[p]ersonal injury protection benefits *paid pursuant to this section* shall be overdue if

not paid within 30 days...” The impact of this change was to clarify the statutory scheme and to provide, precisely as argued by Petitioner here and below, that only expenses which are subject to the statute (*i.e.* reasonable, necessary, and related) are contemplated to be paid under the statute.

In their attempt to have this court engraft the thirty day requirement of section 627.736(4)(b) onto section 627.736(1), the Respondent and her *amici* would have this court re-write the provisions of subsection (1). That section of the no-fault law clearly provides that insurance policies complying with the statute must pay benefits only for losses which result from a bodily injury “*arising out of the ownership, maintenance or use of a motor vehicle.*” These statutory losses include, *inter alia*, reasonable expenses for *necessary* medical services.

The fourth district, in *Fortune Insurance Company v. Everglades Diagnostic, Inc.*, 721 So. 2d 384, 385 (Fla. 4th DCA 1997), has clearly rejected this type of statutory “grafting” process. There the claimant had hoped to engraft the “overdue” provision onto the separate provision which allowed for the arbitration of a provider’s claim for benefits. The court noted,

Turning to the substantive issue, it is difficult to understand the

plausibility of a holding that arbitration under section 627.736(5) is lost unless a PIP insurer demands it within 30 days of receiving the unpaid bills. The supposed time limitation for demanding arbitration is based on an interpretation of section 627.736(4)(b)'s provision that bills are overdue if unpaid within 30 days of notice of the loss and amount. We think, however, that the providers have simply read too much into the 30-day overdue provision.

Section 627.736(4)(b) says that PIP benefits paid under this section "shall be overdue if not paid within 30 days...." Section 627.736(4)(c) says that "[a]ll overdue payments shall bear simple interest at the rate of 10 percent per year." As we understand these two provisions, they merely make the PIP insurer liable for interest on such claims if payment is not made within 30 days from the notice. See *Martinez v. Fortune Ins. Co.*, 684 So. 2d 201 (Fla. 4th DCA 1996) (statute makes claims for PIP benefits overdue when not paid within 30 days from receipt; failure of insurer to pay claim within 30 days subjects insurer to interest on claim). Hence, appropriately read, the function of the statute is to define when interest begins to accrue on unpaid PIP benefits.

The text of section 627.736(4) certainly does not mention the arbitration provision in section 627.736(5), which itself also fails to mention the 30 day provision in section 627.736(4)(b). While we are required to read statutes in their entirety, we are not free to add provisions to parts of a statute under the guise of such reading. Consequently, we are unable to agree that there is any 30-day requirement on the enforcement of the subsection (5) arbitration provision.

Fortune Insurance Co. at page 385.

The PIP Act's statutory scheme provides for a rational procedure to ensure the prompt payment of claims subject to payment under the act: first, the expenses claimed must be *covered* benefits under the policy and the law (*i.e.*, they must represent reasonable expenses for necessary medical care related to a covered automobile accident); if they are, then the PIP carrier must make payment of the requested benefits within thirty days after receipt of the claim *unless* the carrier has reasonable proof why the benefits are not owed; lastly, if benefits are owed and *not paid* within thirty days, then they are deemed overdue and statutory penalties are imposed.

“[W]here a particular remedy is conferred by statute, it can be invoked only in the extent and manner prescribed,” *City of Miami v. Cosgrove*, 516 So. 2d 1125, 1127 (Fla. 3rd DCA 1987, citing *Gunn v. Robles*, 100 Fla. 816, 817, 130 So. 463 (1930)). The specific language of the statute is the polestar in this respect. The legislature has here prescribed a remedy should benefits owed under the Act become overdue, that is, the imposition of statutory interest and attorney's fees. Hence, in determining that the carrier also loses the right to challenge the appropriateness of the claimed expense, the court below judicially creates a remedy clearly never contemplated by the legislature.

b. Dunmore and the Third District

Respondent and her *amici* argue that the court below was correct in relying upon its earlier cases of *Crooks v. State Farm Mutual Automobile Insurance Company*, 659 So. 2d 1266 (Fla. 3rd DCA 1995) and, *Fortune Insurance Company v. Pacheco*, 695 So. 2d 394 (Fla. 3rd DCA 1997) as authority for the proposition that a PIP carrier in Florida loses its right to contest a bill submitted for payment after thirty days and, thus, may be obligated to pay for medical expenses which are **not** reasonable, **not** necessary, and **not** related to a car accident. These cases, though, are factually distinguishable from the case at bar, and are bottomed upon *dicta* from another case which is also inapposite to the case at bar, *Dunmore v. Interstate Fire Insurance Company*, 301 So. 2d 502 (Fla. 1st DCA 1974)

All of the cited cases involve claims where the expenses were admitted by the insurance carrier to represent reasonable bills for necessary medical expenses related to a car accident. This is the crucial distinction which renders these cases inapplicable to the matter *sub judice*.

In *Fortune Insurance Company v. Pacheco*, although the expenses claimed were

admitted to be *covered* expenses under the policy and the statute, the insurance company attempted to impose a condition precedent to recovery which was unauthorized by the no-fault act. Similarly, in *Dunmore v. Interstate Fire Insurance Company*, the insurance company did not contest the insured's entitlement to the PIP benefits requested but merely disputed the allowance of attorney's fees after payment. Finally, in *Crooks v. State Farm* it was conceded that the benefits sought were *covered* expenses under the law. There, as in *Pacheco*, the insurance company was attempting to restrict the payment of benefits otherwise payable under the PIP act by imposing conditions precedent not found in the statute. Indeed, as the *Crooks* court noted,

In the instant case, State Farm never claimed that it was not responsible for the requested claims. Instead, State Farm maintained that it would not recognize the claims until they were submitted in a particular in-house claim form.

Crooks at page 1269.

In *AIU Insurance Company v. Daidone*, the claimant cited these same cases as authority for the proposition that the PIP carrier lost its right to contest a medical bill where a countervailing medical report was not obtained. The *Daidone* court easily distinguished them by noting, as Petitioner has here,

[t]he *Perez* court relied on *Fortune Insurance Co. Pacheco*, 695 So. 2d 394 (Fla. 3d DCA 1997). *Pacheco*, however, was distinguishable because in that case the insured agreed that the benefits were due. It also relied upon *Dunmore v. Interstate Fire Insurance Co.*, 301 So. 2d 502 (Fla. 1st DCA 1974), but in *Dunmore*, as in *Pacheco*, the no-fault benefits were owed. The issue was whether, where the insurer did not pay the claim within thirty days, it had to pay attorney's fees under section 627.428, Florida Statutes.

The court below failed to note this crucial distinction. Instead, it once again cited the *dicta* in the *Dunmore* case to the effect that,

The insurance company has thirty days in which to verify the claim after receipt of an application for benefits. There is no provision in the statute to toll this time limitation. The burden is clearly on the insurer to authenticate the claim within the statutory time period.

Perez v. State Farm Fire & Casualty, 746 So. 2d 1123, 1125 (Fla. 3d DCA 1999).

It should be noted, from the outset, that the cited statement from *Dunmore* is factually inaccurate. There is, and was at the time that *Dunmore* was decided, a “savings” clause in the statute which does, indeed, toll the thirty day requirement. Section 627.736(4)(b) clearly provides now, as it provided then, that “any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been

furnished to the insurer.” Secondly, *Dunmore* dealt with the situation where the insurance carrier agreed that the benefits were payable under the statute and, as such, is not pertinent to the discussion here. The facts there were quoted succinctly as follows:

On October 23, 1972, appellant sustained serious injuries in an automobile accident as a result of which he was hospitalized until December 12, 1972. An application for 'no fault' benefits was filed by appellant on January 16, 1973, including an executed authorization for medical information and wage and salary information. Payment of the benefits were not made within thirty days as required by Section 627.736(4)(d) and appellant filed suit. A default judgment was entered but later set aside. *Appellee did not contest appellant's entitlement to the \$5,000.00 benefits but merely disputed the allowance of attorney's fees.*

Dunmore at page 502.

By its own terms, then, *Dunmore* is limited to a situation where the benefits claimed are not contested by the carrier, and where the dispute merely involves the applicability of attorney's fees pursuant to section 627.736(8), Florida Statutes. Reliance, then, upon *Dunmore* by the court below, and by the Respondent and her *amici* here, is misplaced.

c. Lasky v. State Farm

In *Lasky v. State Farm Insurance Company*, 296 So. 2d 9 (Fla. 1974), this court

upheld the constitutionality of the no-fault scheme by finding that the act provided a reasonable alternative to the traditional action in tort by assuring that an injured party is provided a recovery of major and salient economic losses from their own insurer. What Respondent and her *amici* fail to recognize, however, is that in *Lasky* it was assumed that the amounts to be collected from the insurer in the way of no-fault benefits were those same economic losses that would otherwise be available from a tortfeasor, *i.e.*, expenses which a jury could award as reasonable expenses for necessary medical care caused by an accident. In a traditional tort action the claimant bears the burden of establishing the reasonableness, necessity, and relationship of the expenses claimed and the accident alleged. *See East West Karate Association, Inc. v. Riquelme*, 638 So. 2d 604 (Fla. 4th DCA 1994). This is the same burden a PIP claimant must bear. *See Derius v. Allstate Insurance Company*, 723 So. 2d 271 (Fla. 4th DCA 1998). The *Lasky* court recognized that PIP benefits were to act as the reciprocal equivalent to traditional tort damages:

F.S. s 627.733(4), F.S.A., provides that an owner of a motor vehicle as to which security is required and who does not have such security in effect at the time of an accident has no tort immunity, but is personally liable for payment of the benefits under F.S. s 627.736, F.S.A., for personal injury and has all the

obligations of an insurer under the no-fault insurance act. Thus, the owner of a motor vehicle is required to maintain security (either by insurance or otherwise) for payment of the no-fault benefits, and has no tort immunity if he fails to meet this requirement. This provides a reasonable alternative to the traditional action in tort.

Lasky at page 13.

Further, in *Lasky*, this court deemed it worthy of note that “s. 627.736(1) and (1)(a) specify as to medical expenses that these must be such as are ‘reasonable’ and that such expenses shall be for ‘necessary medical, etc.’ services.” *See Lasky* at page 15. Hence *Lasky*’s determination of constitutionality was based on the assumption that the medical expenses claimed under the act met the criteria required to recover them from a tortfeasor: *i.e.* that they were reasonable, necessary and related to the automobile accident.

Lasky, then, also fails to support the position of the Respondent and her *amici*.

The Florida Department of Insurance, Division of Insurance Fraud has recently estimated insurance fraud to cost Floridians \$6.9 billion each year. This amounts to the equivalent of \$1,500.00 in additional insurance premiums to each family in Florida. *See* 1998-1999 Annual Report, Division of Insurance Fraud, Florida Department of

Insurance 8 (1999). To require the payment of expenses which are clearly not intended to be covered under the PIP statute,¹ as mandated by the lower court's determination, can only work to make it more difficult for insurance carriers to see that what is appropriately owed, is paid.

CONCLUSION

The decision of the third district determining as a matter of law that STATE FARM lost its right to contest a claim for medical bills submitted

¹ Expenses, it must be assumed, which are also not reasonably within the minds of the contracting parties. *See Blish v. Atlanta Casualty Company*, 736 So. 2d 1151, 1155 (Fla. 1999).

solely because it failed to secure, within thirty days, proof that the medical bills were not covered by the PIP statute is not supported by the plain language of the statute, the public policy of the state, or existing case law. As such, this court should approve the decision of the Fourth District Court of Appeal in *AIU Insurance Company v. Daidone*, 25 Fla. L. Weekly D1625 (Fla. 4th DCA July 5th, 2000), and the decision of the Fifth District Court of Appeal in *Jones v. State Farm Mutual Automobile Insurance Company*, 694 So. 2d 165 (Fla. 5th DCA 1997), and should reverse the decision below and remand this matter to the trial court for further proceedings as to the relatedness, reasonableness, and necessity of the expenses submitted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed on October 10, 2000, to: AMADO ALAN ALVAREZ, ESQUIRE, Attorney for Respondent, Suite 209, 7000 S.W. 97th Avenue, Miami, Florida 33173. Telephone: (305) 271-1097; JOHN H. RUIZ, ESQUIRE, 198 North Douglas Road, Miami, Florida 33125. Telephone: (305) 649-0200; STEVEN STARK, ESQUIRE, Fowler, White, et al., Nationsbank Tower 17th Floor, 100 S.E. 2nd Street, Miami, Florida 33131; NORMA G. KASSNER, ESQUIRE, 3909 N.E. 163rd Street, Suite 204, North Miami Beach,

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