IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
CASE NO. 1D13-1355

KEVIN MCCARTY, in his official capacity as the Commissioner of the FLORIDA OFFICE OF INSURANCE REGULATION,

Appellant,

v.

ROBIN A. MYERS, D.C., et al.,

Appellees.

Case No. 1D13-1355

L.T. Case No. 2013 CA 0073

ON APPEAL FROM A NON-FINAL ORDER OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

AMICUS CURIAE BRIEF OF FLORIDA JUSTICE ASSOCIATION IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF AMICUS IDENTITY AND INTEREST

The Florida Justice Association ("FJA") files this amicus curiae brief in support of the Appellees. Formerly known as the Academy of Florida Trial Lawyers, the FJA is a voluntary statewide association of more than 3,000 trial lawyers whose practices emphasize the protection of the personal and property rights of individuals. Members of the FJA are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. The FJA has been involved as amicus curiae in hundreds of cases in the Florida appellate courts.

The FJA's interest in this case is in preserving the constitutionally-guaranteed right of Florida citizens, like Jane Doe in this case, to have access to the courts of this State. Fla. Const., art. I, § 21. The 2012 Personal Injury Protection ("PIP") legislation not only strips citizens injured by motor vehicle accidents of their ability to receive payment for necessary medical care, but also retains bars to the courthouse. The coverage afforded under the 2012 PIP amendments is no longer a reasonable alternative to being able to seek full compensation in a court of law.

The undersigned counsel is representing the FJA on a pro bono basis and is receiving no compensation or promise of compensation from any party.

SUMMARY OF ARGUMENT

The trial court did not err in enjoining Appellant from enforcing the new provisions in section 627.736 that: (1) require medical treatment within 14 days to have any PIP coverage; (2) limit coverage to a quarter of that purchased unless a limited class of physicians declares an "emergency medical condition," a term which is itself amorphous; and (3) prevent coverage for certain types of medically-necessary treatment under all circumstances.[1] PIP was designed to offer speedy payment of "major and salient economic losses," regardless of fault, in exchange for certain limitations on the recoverable damages at law. Historically, the Florida Supreme Court has considered that this trade-off is a reasonable alternative to access to the courts. With the new amendments, however, PIP is no longer a "reasonable alternative."

In its initial brief, Appellant takes the position that the 2012 PIP amendments are not constitutionally infirm because Florida citizens are merely receiving "fewer massages and acupuncture visits," but they can still "recover 'their major and salient economic losses.'" (Init. Br. at 25.) As advocates who work closely with injured citizens in this State, the FJA disagrees. The 2012 PIP amendments will have a catastrophic impact on persons injured in motor vehicle accidents, often preventing them from receiving *any* benefits under their PIP

[1] The amendments arose in House Bill 119, Chapter 2012-197, § 10, Laws of Florida, and will be referred to herein as the 2012 PIP amendments.

policies, and yet still being precluded from recovering against an at-fault driver until damages exceed their $10,000 policy limits. The result is that tortfeasors still retain the right to a $10,000 immunity from litigation, and no liability for non-economic damages unless the plaintiff suffered a permanent injury, even though the plaintiff may not have received a penny in PIP benefits. This is an unworkable situation and is not a reasonable alternative to the constitutionally-guaranteed right to seek "redress of any injury" in the courts of this State.

ARGUMENT

I. OPERATION OF THE CURRENT PIP STATUTES.

When the Legislature required PIP coverage as part of the Florida Motor Vehicle No-Fault Law, its goal was to provide "swift and virtually automatic payment" for injured motorists. *Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So. 2d 328, 332 (Fla. 2007). To this end, and under the current version of the No-Fault Law, the Legislature requires all motorists in the State to carry $10,000 in PIP insurance, which would pay medical and disability benefits regardless of fault. *See* § 627.736(1), Fla. Stat. (2013). In exchange for this no-fault compensation system, the Legislature set up two distinct bars to the courthouse. First, a person may not recover tangible damages from a tortfeasor until his damages exceed "his applicable policy limits." *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 14 (Fla. 1974); § 627.737(1), Fla. Stat. (2013). This is true even though benefits are not

actually payable due to an authorized exclusion. *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 14 (Fla. 1974); § 627.737(1), Fla. Stat. (2013). Second, an injured party may not recover in tort for intangible damages unless he has suffered permanent injury or death. *See* § 627.737(2), Fla. Stat. (2013). Thus, if an injured person's damages are not permanent and total less than $10,000, the suit will be dismissed. *See* § 627.737(3), Fla. Stat. (2013).

However, the 2012 PIP amendments placed further, additional restrictions on the ability of injured motorists to recover for their losses. In section 627.736, Florida Statutes, the Legislature now requires all motorists to carry $10,000 in medical and disability benefits, but allows substantially less in benefits to be paid under certain, not-uncommon, circumstances.

First, an injured motorist may only receive $2,500 in benefits – despite being required to maintain $10,000 in insurance – if a physician, physician's assistant, dentist, or advanced registered nurse practitioner declares that the claimant "did not have an emergency medical condition." § 627.736(1)(a)4, Fla. Stat. (2013). An "emergency medical condition" is defined as

> a medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that the absence of <u>immediate medical attention</u> could reasonably be expected to result in any of the following:
> (a) Serious jeopardy to patient health.
> (b) Serious impairment to bodily functions.
> (c) Serious dysfunction of any bodily organ or part.

§ 627.732(16), Fla. Stat. (2013) (emphasis added). Under this definition, a listed health care provider could determine that an accident victim who did not immediately proceed to the emergency room or her physician for "immediate medical attention" did not experience an "emergency medical condition." Waiting one day to get an appointment with one's family physician could result in motorists losing 75% of their benefits.

Second, an injured motorist may only recover medical benefits – again, despite being required to carry $10,000 in insurance – if they seek "initial services and care . . . within 14 days after the motor vehicle accident." § 627.736(1)(a), Fla. Stat. (2013). Any person who gives an injury more than two weeks to resolve – as many doctor-avoiding individuals are inclined to do – will lose 100% of their PIP benefits. *See* Affidavit of Stacy Walker, D.C., Appe. App'x at Tab 3C (reporting that the majority of her patients had not sought treatment within 14 days of their accidents). Anyone whose injuries manifest more than 14 days after an accident will also lose 100% of their PIP benefits. *See* Appt. App'x at Tab 4 at 61 (testimony that sometimes emergent medical conditions are not picked up within 14 days); Appe. App'x Tab 2 at 20 (testimony that accidents can cause injuries that do not manifest symptoms for weeks).

Likewise, an individual who seeks massage or acupuncture treatment before seeing another provider outside the 14-day window also will lose 100% of her

benefits because those two medical specialties cannot provide compensable "medical benefits," and thus cannot be the providers who offer initial services. § 627.736(1)(a)5, Fla. Stat. (2013). Furthermore, although chiropractors are authorized to provide treatment to PIP insureds, and can certify that a patient *does not* have an "emergency medical condition," they cannot make the determination that a patient *has* suffered an "emergency medical condition." *See* § 627.736(1)(a)1-3, Fla. Stat. (2013). Thus, an injured motorist who first seeks treatment from a chiropractor before seeing another provider outside the 14-day window cannot receive more than $2,500 in PIP benefits. As these examples make clear, the 2012 PIP amendments create a myriad of different ways that injured motorists can lose all or most of the benefits they pay for through mandatory PIP insurance.

Not only will these injured motorists not receive prompt compensation of their major medical expenses – to say nothing of the ability to direct their own treatment through the necessary medical modalities of their choosing[2] – but they will not be able to sue until their actual medical bills and lost wages exceed

[2] A licensed medical doctor averred that massage therapists offer the "most beneficial treatment to a patient in an acute state of injury." *See* Dr. Crespo Affidavit, Appe. App'x at 84 (within Tab 3A). He further averred that the American Medical Association has done studies to prove the efficacy of massage. *Id.* In his opinion, the 2012 PIP amendments deny patients "good medical care." *Id.* Similarly, a chiropractor averred that limiting the treatment that chiropractors can provide to accident victims "will result in harm to [his] clients and endanger the public health." *See* Dr. Hansen Affidavit, Appe App'x at 112 (within Tab 3B).

$10,000. Section 627.737(1) still provides immunity from suit "to the extent that the benefits described in 627.736(1) are payable for such injury, or *would be payable but for any exclusion authorized by ss. 627.730-627.7405*. . . ." (Emphasis added). Section 627.736 falls within that range of statutory exclusions. Thus, under the 2012 PIP amendments, insurance providers are allowed to exclude medical bills when a claimant delays treatment or has not experienced an "emergency," cutting benefits by 75-100%, yet at-fault drivers still enjoy immunity from suit up to $10,000.[3] In essence, the Legislature has created a *forced* $7,500 to $10,000 deductible for PIP policy holders in all but the most emergent of cases without restoring the common law right to sue a wrongdoer in court for damages. This is an unworkable result for Florida citizens.

II. THE 2012 AMENDMENTS TO PIP UNCONSTITUTIONALLY BAR ACCESS TO COURTS WITHOUT PROVIDING A REASONABLE ALTERNATIVE.

Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." By virtue of this provision, the Florida Supreme Court has held that "the Legislature is without power to abolish [a common law] right without providing a reasonable alternative to protect the rights of the people

[3] This is in direct contravention of the representation made by amicus Property Casualty Insurers of America, et al. ("PICA"), that citizens actually have *greater* access to the courts because they can sue after $2,500 in medical expenses and for all massage and acupuncture treatments. *See* PICA Brief at 7, 18-20.

of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment[4] of such right, and no alternative method of meeting such public necessity can be shown." *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973); *see also Smith*, 507 So. 2d at 1088.[5] Prior to the 2012 PIP amendments, the Florida Supreme Court declared that the PIP statutes provide "a reasonable alternative to the traditional action in tort." *Lasky*, 296 So. 2d at 15. It reasoned that:

> [i]n exchange for the loss of a former right to recover—upon proving the other party to be at fault—for pain and suffering, etc., in cases where the thresholds of the statute are not met, the injured party is assured a speedy payment of his medical bills and compensation for lost income from his own insurer, even where the injured party was himself clearly at fault. Additionally, he can recover for such expenses which are in excess of his policy limits by the traditional tort action, and may recover for intangible damage (pain and suffering,

[4] The Florida Supreme Court later explained that a cause of action need not be totally abolished before access to the courts is denied. *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1088-89 (Fla. 1987). In *Smith*, the Court found a cap on non-economic damages was unconstitutional because an injured party is entitled to receive the amount awarded him by the jury, and not an amount limited by the Legislature. *Id.* Similarly, injured motorists are entitled to recover for their injuries and should not be forced to absorb $10,000 in non-compensable medical bills before bringing suit.

[5] PICA argues that combating fraud and reducing PIP premiums would justify abolishing a common law claim for damages. *See* PICA Brief at 5-6, 14. Even if PICA is correct that there is an overpowering public necessity (which there is not), PICA merely argues that there are no "apparent alternative means for meeting this public necessity." *Id.* at 14. The Legislature, however, considered many such alternatives. Appt. App'x, Tab 2, Ex. E at 5-7.

> etc.) by means of such suit in all but the limited class of cases above mentioned.[6]

Id. Thus, in exchange for only a very small number of cases where intangible damages would not be recoverable, "the injured party is assured of recovery of his major and salient economic losses from his own insurer," regardless of fault. *Id.* at 14.

Just prior to *Lasky*, the Court was also called upon to consider whether a similar statute, prohibiting a motorist from bringing a property damage suit unless damages exceeded $550, unconstitutionally barred access to the courts. *Kluger v. White*, 281 So. 2d 1, 2-3 (Fla. 1973). There, because the Legislature did not require motorists to maintain property damage insurance, the Court found that citizens had no reasonable alternative to recovering their damages in tort. *Id.* at 5. The *Kluger* Court noted, as did the Court in *Lasky*, that where insurance for certain damage is required, that insurance provides a reasonable alternative to a traditional tort action because injured parties are not left without compensation. *Id.* at 5; *Lasky*, 296 So. 2d at 9. But where a statute leaves the injured party with "no

[6] When *Lasky* was decided in 1974, a tortfeasor was only immune from suit for intangible damages in the "limited class of cases in which the benefits for medical expenses are less than one thousand dollars." *Lasky*, 296 So. 2d at 14. The Court noted that "[i]n this day of ever-increasing medical and hospital costs, the $1,000 minimum seems less than illusory." *Id.* at 15. Now, tortfeasors are immune from suit for intangible damages unless they kill or permanently injure their victims. § 627.737(2), Fla. Stat. (2013).

recourse against any person or insurer for loss caused by the fault of another," it is unconstitutional. *Id.* at 3.

Shortly after *Lasky*, the Legislature amended the PIP laws. Significantly, those changes raised PIP coverage from $5,000 to $10,000, reduced the medical benefits payable from 100% to 80%, eliminated causes of action for intangible damages except for permanent injuries, and allowed insureds to elect higher deductibles. *Chapman v. Dillon*, 415 So. 2d 12, 16, 19 (Fla. 1982). Because of these changes, the plaintiffs in *Chapman* renewed the argument that the PIP statutes denied them access to courts without a reasonable alternative, which the Supreme Court again rejected. *Id.* at 17. The Court stated that "the crux in *Lasky* was that all owners of motor vehicles were required to purchase insurance which would assure injured parties recovery of their major and salient economic losses." *Id.; see also State Farm. Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1076 (Fla. 2006) (same). Although the Court noted that the percentage of recovery had been reduced, coverage actually increased from $5,000 to $10,000, thus assuring that "major and salient economic losses" are compensated through a net increase in benefits. *Chapman*, 415 So. 2d at 17.

In their current iteration, the PIP statutes no longer assure that injured motorists receive compensation for their "major and salient economic losses." The statutes require motorists to carry $10,000 in insurance, yet cut benefits by 75-

100% in many, if not most, instances. These benefit thresholds have no relevance to the severity of a person's injuries or the amount of medical care they require. Furthermore, even if a motorist is precluded from recovering under her own PIP insurance, due to the immunity afforded insured motorists, she still cannot sue the at-fault driver until she has exceeded $10,000 in damages or has suffered a permanent injury. Maintaining often-worthless PIP insurance, then, is no longer a reasonable alternative to being able to recover in tort. As Justice Overton noted in his concurrence in *Chapman*, the PIP amendments that provided for just a 20% reduction in allowable benefits were "at the absolute outer limits of constitutional parameters." *Id.* at 19 (Overton, J., concurring). The 2012 PIP amendments, creating 75-100% benefit reductions, far exceed any constitutional parameters contemplated by the *Chapman* Court.

The *Chapman* Court also supported its reasoning with the conclusion that "[m]any motorists of this State are covered by some other type of insurance or benefit program that would help pay for their medical expenses and lost income if they were injured in an automobile accident." 415 So. 2d at 17. PICA argues that with the implementation of the Affordable Health Care Act next year, all motorists will have this additional coverage. *See* PICA Brief at 18. However, even with this coverage, it is no longer true (as it presumably was in 1982) that health insurance covers car accident victims. The trial court heard testimony from multiple sources

that there is no, or very little, general health care coverage for car accidents in most cases. *See* Appt. App'x Tab 4 at 68 ("I've never heard of a general insurance company paying for injuries that were related to an auto accident."); Appe. App'x Tab 2 at 27-28 (testimony that general health insurance and Medicare either do not cover accident victims or provide only limited coverage). Accordingly, the 2012 PIP amendments cannot be seen as backed up by alternative insurance.

Moreover, the difference between the challenged amendments in *Chapman* and the 2012 PIP amendments strip away the logic of the *Chapman* Court. It is one thing to create a net increase in benefits and allow insureds to elect a higher deductible (as the amendments did in *Chapman*), and quite another to force citizens to purchase worthless insurance for thousands of dollars per year. The statistics before the Legislature reveal that an accident-free family with teen drivers in Miami-Dade pays over $3,200 each year for PIP coverage. (PICA App'x, Tab 2 at 2.) Even with the intended 10% premium reduction – which mostly did not happen[7] – these families are still making annual PIP premium payments of $2,800; $300 *more* than the benefits recoverable for all but emergency situations. Thus, not only do the 2012 PIP amendments force Florida citizens to fill the coffers of the insurance companies with little hope for a return on their investment, but the

[7] *See* Appe. Appx. Tab 2 at 40 (testimony that the Office of Insurance Regulation received 150 rate filings following the 2012 PIP amendments and only 35 of those had the 10% discount required by section 627.0651, Florida Statutes.)

No-Fault Law still precludes those same injured parties from recovering from the tortfeasor until they have amassed $10,000 in damages or suffered a permanent injury.

Although Appellant and the amicus who support him would like this Court to blindly follow the *Lasky* and *Chapman* decisions and uphold the 2012 PIP amendments, this Court has the duty to individually assess amendments to previously-constitutional statutory schemes to ensure they still pass constitutional muster. The Court did just that in the recent case of *Westphal v. City of St. Petersburg/City of St. Petersburg Risk Mgmt.*, Case No. 1D12-3563, 2013 WL 718653 at *1 (Fla. 1st DCA Feb. 28, 2013). There, the Court examined a worker's compensation scheme, which like the No-Fault Law, was designed to provide swift payment for injuries in exchange for the right to sue. *Id.* at *4. Between the time the worker's compensation law was enacted in 1968, and the amendments under consideration from 1994, the Legislature reduced the amount of temporary total disability benefits an injured worker could receive by 71%. *Id.* at *5. The reduction meant that severely injured workers could no longer receive temporary disability benefits after just 104 weeks, but also could not begin to collect permanent disability benefits until they reached maximum medical improvement, sometimes years later. *Id.*

In holding the law unconstitutional, this Court stated:

> A system of redress for injury that requires the injured worker to legally forego any and all common law right of recovery for full damages for an injury, and surrender himself or herself to a system which, whether by design or *permissive incremental alteration*, subjects the worker to the known conditions of personal ruination to collect his or her remedy, is not merely unfair, but is fundamentally and manifestly unjust.

Id. at *8 (emphasis added). The same rationale is true with the 2012 PIP amendments. Through permissive incremental alteration, the Legislature has taken what was once a reasonable alternative to suit for motor vehicle accident victims, and turned it into a scheme where Florida families must purchase often worthless – but still expensive – insurance, and yet still cannot sue until they have absorbed $10,000 in medical bills or sustained a permanent injury. As in *Westphal*, the scheme is "not merely unfair, but is fundamentally and manifestly unjust." *Id.* at *8.

In short, this case lies at the intersection of *Kluger* and *Lasky*. Under the original PIP law, an injured party was guaranteed recovery of his medical bills and lost wages up to $10,000. Suit in tort would not lie until the $10,000 benefit – which all motorists are required to carry – had been extinguished. Now, however, an injured motorist who carries a $10,000 benefit may only receive $2,500 in benefits – or be denied coverage altogether if she seeks treatment after just 14 days – and yet those motorists still: (1) will not be able to sue in tort until their medical expenses exceed $10,000; and (2) cannot sue for non-economic damages unless

they suffer a permanent injury. The law has now become more akin to the flat prohibition in *Kluger* than it is to the original law passed upon in *Lasky*. The Legislature has created a class of citizens, like those in *Kluger*, who have "no recourse against any person or insurer for loss caused by the fault of another." 281 So. 2d at 3. Accordingly, the 2012 PIP amendments unconstitutionally deny Florida citizens access to the courts without providing a reasonable alternative. The trial court's temporary injunction should be upheld.

CONCLUSION

For the foregoing reasons, the trial court did not err in concluding that the 2012 amendments to PIP unconstitutionally deny Florida citizens access to courts and entering a temporary injunction precluding enforcement of the new provisions.

Respectfully submitted,

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