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Abstract

In an attempt to reduce automobile insurance rates1 and the cost of automobile accidents2 in Florida, the legislature enacted the “Florida Automobile Reparations Reform Act” in 1971.

KEYWORDS: rule, collateral, florida

COLLATERAL SOURCE RULE: FLORIDA STATUTE § 627.7372.

In an attempt to reduce automobile insurance rates[1] and the cost of automobile accidents[2] in Florida, the legislature enacted the "Florida Automobile Reparations Reform Act" in 1971.[3] This act, which became effective in 1972, contained basic concepts of no-fault insurance, personal injury protection (PIP) benefits, and certain "threshold requirements."[4] The plan, however, did not serve to reduce the cost of automobile insurance, causing the Florida Legislature to modify the act.[5]

Though innovative in some regards, the modified no-fault legislation failed to produce the reduction in insurance rates promised by its drafters. Once again, the Florida Legislature attempted to resolve the problem, and in 1977 the "Florida Automobile Reparations Reform Act of 1977" emerged.[6] It was here that section 627.7372 of the Florida Statutes, regarding the admissibility of payments made by collateral sources, was initially created.[7] Since 1977, the Legislature has seen fit to amend this act[8] and it is likely that legislative innovation, as well as experimentation, will continue in this field.[9]

1. Levin, *Visiting Florida's No-Fault Experience: Is It Now Constitutional?*, 54 FLA. B.J. 123 (1980).

2. J. ALPERT & P. MURPHY, FLORIDA AUTOMOBILE REPARATIONS § 1-1 (1980). *See, e.g.*, Powers, *Automobile Accident Reparations Controversy: Current Status*, 44 FLA. B.J. 186 (April 1970).

3. FLA. STAT. §§ 627.730-741 (1971).

4. J. ALPERT & P. MURPHY, *supra* note 2.

5. CONTINUING LEGAL EDUCATION COMMITTEE, THE FLA. BAR, FLORIDA NO-FAULT INSURANCE PRACTICE (2d ed. 1979). *See* J. ALPERT & P. MURPHY, *supra* note 2 for more detailed information on this legislation.

6. FLA. S.B. 1181 (1977) creating ch. 77-468, 1977 Fla. Laws 2057.

7. *Id.* § 34.

8. Ch. 78-374, 1978 Fla. Laws 1041.

9. Change will in fact occur by virtue of the automatic repeal of the Act on July 1, 1982.

I. The Evolution of Section 627.7372

The 'collateral source rule' states that "total or partial compensation for an injury received by an injured party from a collateral source wholly independent of the wrongdoer will not operate to lessen the damages recoverable from the person causing the injury."[10] With few exceptions, this rule has been adhered to by the Florida courts[11] and continues to be in use today.[12] However, in recent years, an exception to this rule has emerged in cases involving the operation of a motor vehicle within the confines of the no-fault act.[13]

A. 1977: Florida Statute § 627.7372

Florida Statute § 627.7372 entitled "Collateral Souces of Indemnity" became effective on July 1, 1977 and provides that:

> (1) In an action for personal injury or wrongful death arising out of the ownership, operation, use or maintenance of a motor vehicle, the court shall admit into evidence the total amount of all collateral sources which have been paid to the claimant prior to the commencement of the trial. The court shall also admit into evidence any amount paid by the claimant to secure such collateral source.[14]

The second part of the statute enumerates payments to the claimant that will be considered "collateral sources."[15] An illustration of this

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10. 15 Am. Jur. *Damages* § 198 (1938); 25 C.J.S. *Damages* § 99 (1941).

11. 17 Fla. Jur. 2d *Damages* § 39 (1980); Paradis v. Thomas, 150 So. 2d 457 (Fla. 2d Dist. Ct. App. 1963).

12. Hartnett v. Riveron, 361 So. 2d 749 (Fla. 1978).

13. The Florida Insurance and Tort Reform Act of 1977, § 34, Fla. Stat. § 627.7372 (1977). Exception to the collateral source rule has also been taken in medical malpractice suits by virtue of Fla. Stat. § 768.50 (1979). Much of the information in this note may be applied to section 768.50. However, some underlying differences do exist between the two statutes. This note will be confined to a discussion of section 627.7372.

14. Fla. Stat. § 627.7372(1) (1977).

15. (2) For purposes of this section, "collateral sources" means any payments made to the claimant, or on his behalf, by or pursuant to:
(a) The United States Social Security Act; any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits.

rule is as follows:

Plaintiff is injured in an automobile accident with defendant causing plaintiff to institute a suit against the defendant tortfeasor. However, prior to the commencement of the trial, plaintiff collects $10,000 through her PIP benefits provided under her insurance policy. Section 627.7372 provides that this $10,000 payment will be admissible evidence at the time of trial.[16]

B. 1978: Florida Statute § 627.7372

Upon the continuation of soaring insurance rates in Florida, in 1978 the legislature, once again, amended the collateral source statute to read:

> (1) In any action for personal injury or wrongful death arising out of the ownership, operation, use, or maintenance of a motor vehicle, the court shall admit into evidence the total amount of all collateral sources paid to the claimant, *and the court shall instruct the jury to deduct from its verdict the value of all benefits received by the claimant from any collateral source.*[17]

Two major changes were adopted in the 1978 amendment. First, the statute no longer allows into evidence amounts paid to secure the collateral source. Second, the court must now instruct the jury to deduct from its verdict the value of all collateral source benefits received by the claimant. This statute became effective January 1, 1979 and remains in effect at the time of publication of this note.[18]

(b) Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits except life insurance benefits available to the claimant, whether purchased by him or provided by others.

(c) Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.

(d) Any contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability.

16. This hypothetical assumes compliance with all aspects of the no-fault act.

17. FLA. STAT. § 627.7372 (Supp. 1978) (emphasis supplied). It should be noted that section 627.7372(2) remained the same.

18. Effective August 1, 1979, the statute was amended to include: "(3) Notwith-

II. Recent Constitutional Challenges

"The constitutionality of most no-fault laws has been based on a 1916 United States Supreme Court decision. . . ."[19] The first constitutional challenge to reach the Florida Supreme Court, however, occurred in 1973.[20] The court in *Kluger v. White* ruled that Florida Statute § 627.738[21] was unconstitutional.[22] The court held that this statute denied a plaintiff the right of access to the courts for redress of a particular injury without providing a reasonable alternative to protect that right.[23] The threshold requirements of the Florida no-fault act[24] faced constitutional challenges in *Lasky v. State Farm Ins. Co.*[25] However, the court rejected all the arguments set forth in *Kluger* and upheld the provisions of no-fault. "We now hold, however, that with one exception, the personal injury aspects of F.S. 627.737, F.S.A., are valid and constitutional."[26]

Recently, there has been a great deal of controversy concerning the collateral source provision of the no-fault act. A growing number of circuit court judges throughout the state have held the statute unconstitutional, thus prohibiting the admission into evidence at trial of collat-

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standing any other provisions of this section, benefits received under the Workers' Compensation Law shall not be considered a collateral source." Fla. Stat. § 627.7372(3) (1979).

19. Levin, *supra* note 1, at 124 (citing to Atlantic Coastline R.R. Co. v. Mims, 242 U.S. 532 (1916)).

20. J. Alpert & P. Murphy, *supra* note 2, at § 1-20 (citing Kluger v. White, 281 So. 2d 1 (Fla. 1973)).

21. This statute, which abolished the traditional right of action in tort for property damage arising from an automobile accident, required the plaintiff to seek property damage compensation from his own insurer unless he was not insured for property damage and met a $550 threshold requirement.

22. 281 So. 2d at 5. The court found the statute was in violation of Fla. Const. art. I, § 21.

23. 281 So. 2d at 4.

24. Fla. Stat. § 627.737 (1971).

25. 296 So. 2d 9 (Fla. 1974).

26. *Id.* at 13. The exception declared unconstitutional was that portion of the statute allowing recovery for pain and suffering when the injury was a fracture to a weight-bearing bone, even if the $1,000 threshold of the Act was not met. Additionally, four years later, ch. 77-468, § 42, 1977 Fla. Laws 2087, which dealt with the "Good Drivers Incentive Fund" was severed from the Act on the basis of its constitutionality. State v. Lee, 356 So. 2d 276 (Fla. 1978).

eral source benefits paid to the claimant.[27] In so doing, the courts have embraced the constitutional arguments as set forth in *Kluger* and *Lasky*. These arguments include: denial of access to courts,[28] invasion of the court's rulemaking authority,[29] impairment of the right to contract,[30] denial of equal protection[31] and due process.[32]

A. Access to Courts

Article I, Section 21 of the Florida Constitution guarantees every citizen his day in court. "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[33]

In *Kluger v. White,* the Supreme Court of Florida determined that the legislature could not abolish a common law or statutory cause of action "without providing a reasonable alternative to protect the rights of the people. . ., unless the legislature can show an overpowering public necessity . . . ."[34] The same argument is now sought to be applied to the collateral source statute.[35]

In applying this argument to the collateral source statute, it must be noted that the statute was intended to prevent the duplication of

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27. Puchaty v. Teague, No. 79-5183 (Fla. 18th Cir. Ct., filed Feb. 26, 1980); Womble v. Liberty Mutual Ins. Co., No. 79-9107 (Fla. 9th Cir. Ct., filed Mar. 21, 1980) (prohibiting the admission of collateral sources, but not explicitly declaring the statute unconstitutional); Berman v. Poole, No. 78-21175 (Fla. 17th Cir. Ct., filed Apr. 23, 1980); Jenkins v. Rafferty, No. 79-4593 (Fla. 17th Cir. Ct., filed Oct. 1, 1980) (prohibiting the admission of collateral sources, but not explicitly declaring the statute unconstitutional); Cooper v. Pepper, No. 79-8819 (Fla. 17th Cir. Ct., filed Oct. 21, 1980). These orders represent part of a growing number. *But see* note 69 *infra.*

28. FLA. CONST. art. I, § 21.

29. FLA. CONST. art. II, § 3; FLA. CONST. art. V, § 2(a).

30. FLA. CONST. art. I, § 10.

31. U.S. CONST. amend. XIV.

32. FLA. CONST. art. I, § 9, U.S. CONST. amend. XIV. This challenge, although asserted, has not been expounded on by either plaintiffs' or defendants' motions or the respective orders. *See* cases cited in note 27 *supra.* This article will not therefore specifically address this challenge.

33. FLA. CONST. art. I, § 21.

34. 281 So. 2d at 4.

35. *See* plaintiffs' motions in connection with their respective orders for the cases cited in note 27 *supra.*

benefits.[36] There is, however, no Florida law, statutory or otherwise, which grants the *right* of a claimant to a double recovery. Secondly, the statute continues to preserve a claimant's right to seek legal redress against a tortfeasor. It is the threshold requirements that *may* deny a claimant his day in court, but it is the collateral source statute that *limits* claimant's damages to a single recovery.[37]

An argument has been asserted that the admission of evidence regarding a claimant's receipt of collateral sources "involves a substantial likelihood of prejudicial impact."[38] However, the possibility of prejudice should be weighed (as a matter of public policy) against the possibility of double recovery. This will further have to be balanced with the underlying purpose of the "Florida Insurance and Tort Reform Act of 1977," which is to reduce insurance premiums.[39]

Another problem arises when a particular collateral source insurer maintains a subrogated interest in the claimant's recovery, thus resulting in a double reduction.[40] The courts have not addressed this issue with respect to the constitutional validity of Section 627.7372. One viable approach is the argument that since a plaintiff does not have the right to recover these amounts, an insurance company, thus, cannot maintain the right to subrogation.[41]

The question of whether Section 627.7372 denies a claimant's constitutional right of access to the courts raises some valid arguments on both sides of the issue. When this statute is reviewed by higher courts in Florida, this concern may very well be the focus in determining the constitutional validity of the statute.

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36. This would in turn, hopefully, assist in decreasing insurance rates.

37. The statute states in part: "[T]he court shall instruct the jury to deduct from its *verdict* the value of all benefits received by the claimant from any collateral source." FLA. STAT. § 627.7372(1) (Supp. 1978) (emphasis supplied). The collateral source statute becomes moot if a jury does not find the defendant liable.

38. Eichel v. New York Cent. R.R. Co., 375 U.S. 253, 255 (1963).

39. FLA. S.B. 1181 (1977). Furthermore, it would not be in the province of the courts to decide that these conditions no longer exist. "When the validity of the law depends on the existence of certain facts necessary to be determined by the legislature, the court will presume the requisite facts are established to that body's satisfaction." Florida State Bd. of Architecture v. Wasserman, 377 So. 2d 653, 657 (Fla. 1979).

40. CONTINUING LEGAL EDUCATION, *supra* note 5, at § 5.31.

41. *Id.*

B. Invasion of the Court's Rulemaking Authority

Article II, Section 3 of the Florida Constitution espouses the separation of powers doctrine and reads in part:

"No person belonging to one branch shall exercise any power appertaining to either of the other branches . . . ."[42]

Article V, Section 2(a) of the Florida Constitution enumerates certain powers of the Supreme Court:

"The Supreme Court shall adopt rules for the practice and procedure in all Courts . . . ."[43]

As a result of these two constitutional provisions, the state legislature is prohibited from adopting any statute which regulates practice and procedure in the courts.[44] Whether this collateral source statute is substantive or procedural is another basis for determining its validity.

The area of substance versus procedure has been described as a "twilight zone."[45] In *Parker v. Wideman,*[46] the Fifth Circuit addressed this issue and held that the question of admissibility of collateral sources is a substantive one. "But the fact of the matter is that under Florida law the rule is a substantive rule of law which applies whether or not evidence of collateral compensation is introduced."[47]

However, the portion of the statute which requires the court to instruct the jury on the effect of the evidence presents a more difficult substantive versus procedural problem. This mandatory jury instruction clearly seems procedural in nature. As Justice Adkins noted, "[p]ractice and procedure pertains to the legal machinery by which substantive law is made effective."[48] If this portion of the statute is determined by the courts to be a matter of procedure, it would be possible for the Supreme Court to adopt it in their rules of practice and

42. FLA. CONST. art. II, § 3.

43. FLA. CONST. art. V, § 2(a).

44. In re Clarification of Fla. Rules of Practice and Procedure, 281 So. 2d 204 (Fla. 1978).

45. In re Fla. Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1972) (Adkins, J., concurring), *aff'd,* 272 So. 2d 513 (Fla. 1973).

46. 380 F.2d 433 (5th Cir. 1967).

47. *Id.* at 436. *See* Finley P. Smith, Inc. v. Schectman, 132 So. 2d 460 (Fla. 2d Dist. Ct. App. 1961); Annot., 68 A.L.R. 2d 876 (1959); RESTATEMENT OF TORTS § 92, Comment e at 620.

48. 272 So. 2d at 65 (Adkins, J., concurring).

procedure.[49] When the Civil Rules of Procedure were adopted, statutes which were procedural but did not supersede or conflict with the rules, remained in effect.[50]

The *admissibility* of collateral sources is arguably substantive in light of the holding in *Parker*. However, the purpose of admitting this evidence is effectuated if the jury is instructed to deduct the amount from its verdict. This mandatory instruction, which was added to the original statute in the 1978 amendment,[51] expanded the collateral source rule with the intention of reducing final verdicts and aiding in the overall intent of reducing automobile insurance rates.[52] The statute could be amended, however, to eliminate the jury instruction, which would result in a statute similar to the one in 1977.[53]

C. *Impairment of the Plaintiff's Right to Contract*

It is undisputed that legislative enactments impairing a person's right to contract are a constitutional violation.[54] Article I, Section 10 of the Florida Constitution reads:

"No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."[55] It has been argued that the collateral source statute violates this provision by impairing the value of a plaintiff's contract with his insurer.[56]

The term impairment has been defined in Florida as "[a]ny conduct on the part of the legislature that detracts in any way from the

49. 281 So. 2d 204 (Fla. 1973). *See* Sun Ins. Office Ltd. v. Clay, 133 So. 2d 735 (Fla. 1961).

50. In re Fla. Rules of Civil Procedure (1967 Revision), 187 So. 2d 598 (Fla. 1967).

51. FLA. STAT. § 627.7372 (Supp. 1978).

52. FLA. S.B. 1308 (1978). *See* Senate Staff Analysis and Economic Statement, June 1, 1978 (Brainerd).

53. "If, when the unconstitutional part of a statute is striken, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, the valid portion of the statute will be sustained." Lasky v. State Farm Ins. Co., 296 So. 2d at 21.

54. FLA. CONST. art. I, § 10.

55. *Id.*

56. *See* Memorandum of Law in support of plaintiff's motion in limine, Lang v. Halfpenny, No. 79-3470 (Fla. 17th Cir. Ct., filed Sept. 11, 1980).

value of the contract . . . ."[57] The Florida Supreme Court was confronted with a similar situation when they considered the question whether the enactment of the anti-stacking statute[58] impaired the value of a claimant's pre-existing insurance policy.[59] The court upheld the statute and decided it was *"a reasonable exercise of the state's undisputed authority to regulate the insurance industry in furtherance of the public welfare."*[60] It is possible the court will follow this reasoning when considering the collateral source statute.

D. Equal Protection

It has been advanced that Section 627.7372 violates the equal protection clause of the United States Constitution[61] and Article I, Section 2 of the Florida Constitution as it applies only to actions for personal injury or wrongful death arising out of the operation, use or maintenance of a motor vehicle.[62] However, "[w]hen the difference between those included in a class and those excluded from it bears a substantial relationship to the legislative purpose, the classification does not deny equal protection."[63]

It is undisputed that Section 627.7372 creates a classification of persons injured in motor vehicle accidents. However, this classification is probably not arbitrary since it is a valid legislative response to the

57. Pinellas County v. Banks, 19 So. 2d 1, 3 (Fla. 1944) (emphasis supplied).

58. FLA. STAT. § 627.4132 (1976).

59. Gillette v. State Farm Mutual Auto. Ins. Co., 374 So. 2d 525 (Fla. 1979). Although this issue was brought up a year earlier, the question of the statute's constitutional validity was left open. The court merely invalidated the *application* of the statute to the particular facts at bar. Dewberry v. Auto-owners Ins. Co., 363 So. 2d 1077 (Fla. 1978).

60. 374 So. 2d at 526 (emphasis supplied).

61. U.S. CONST. amend. XIV.

62. *See* Memoranda of Law filed on behalf of plaintiffs' motions in connection with the cases cited in note 27 *supra*. Some of these memoranda suggest the statute also discriminates against *tortfeasors* by providing an unwarranted benefit to the negligent motor vehicle operator and not to one who is negligent in some other manner, but causes identical injuries. However, research did not reveal any cases whereby a tortfeasor, or his insurance company, asserted a claim based on a denial of equal protection because his unfortunate victim is without collateral source benefits, which could have been deducted from a potential judgment rendered against him.

63. 296 So. 2d at 18.

insurance crisis which confronted the public in the 1970's. Furthermore, classifications which discriminate between persons injured in motor vehicle accidents are not unconstitutional. The Florida Supreme Court in *Lasky*[64] was called upon to examine this identical classification to determine whether the threshold requirements of the no-fault act were a denial of equal protection. The court decided this classification did not violate the equal protection clause even though the classification determined a person's right of access to the courts.[65]

In addition to being non-arbitrary, Section 627.7372 must bear a substantial relationship to the legislative purpose in order to sustain its validity.[66] This requirement is arguably met after viewing this statute as an overall scheme to resolve the insurance crisis. "Merely because the Legislature has seen fit to remedy a perceived evil in one area, it is not compelled to extend that remedy to all areas in which it might be applied."[67] Compelling the legislature to pursue an all or nothing approach would not be favorable.[68] In light of the holding in *Lasky,* it seems unlikely that higher courts in Florida will find this statute to be in violation of the equal protection clause.[69]

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64. *Id.*
65. *Id.* at 22.
66. *Id.* at 18.
67. *Id.* at 22.
68. *Id.*
69. Shortly before publication of this note, a unanimous First District Court Appeal upheld the constitutionality of section 627.7372. The court rejected all the arguments raised in this note except the constitutionality of the jury instruction, which was not raised. McKee v. City of Jacksonville, 1981 Fla. Law Weekly 4 (Fla. 1st Dist. Ct. App. Jan. 6, 1981).