IN THE CIRCUIT COURT OF THIRTEENTH CIRCUIT OF FLORIDA
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

MARISSA FAITH PITTS,
f/k/a MARISSA FAITH MILLS,

Plaintiff,

Case No. 18-CA-005038

vs.

Division A

PROGRESSIVE SELECT INSURANCE COMPANY, f/k/a PROGRESSIVE AUTO PRO INSURANCE COMPANY, a foreign for profit corporation, et al.,

Defendants.
_____/

PLAINTIFF'S MOTION FOR REHEARING

Pursuant to Florida Rule of Civil Procedure 1.530, the Plaintiff, Marissa Faith Pitts ("Ms. Pitts"), by and through her undersigned counsel, and moves this Honorable Court to grant rehearing concerning the "Final Order Granting Defendant, Progressive Select Insurance Company's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgement" dated January 28, 2019, and states:

A. Introduction

1. As explained herein, this Court's "Final Order Granting Defendant, Progressive Select Insurance Company's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgement" is in direct conflict with the Second DCA's on-point and controlling decision in *Pearson v. State Farm Mut. Auto. Ins. Co.*, 560 So. 2d 416 (Fla. 2d DCA 1990).

2. This case involves Ms. Pitts' claims for declaratory judgment concerning her personal injury protection ("PIP") coverage under an insurance policy issued by the Defendant, Progressive Select Insurance Company ("Progressive"), and for breach of that insurance policy.

3. Ms. Pitts contends that Progressive is attempting to provide her with less PIP insurance coverage than is required by controlling Florida law. Her claims are based on the following undisputed facts:

a. On or about August 3, 2016, Ms. Pitts was a permissive driver of a motor vehicle (i.e., a 2011 Chevrolet Cruze) which was insured by a Progressive insurance policy providing PIP coverage, and which met the security requirements of Section 627.733, Florida Statutes. *See*, Mot. Summ. J. Hr'g Tr. 5:15-17 (Nov. 28, 2018); *see also*, Progressive policy.

b. At that time, while driving the vehicle insured by Progressive, Ms. Pitts was involved in a motor vehicle accident, and as a result, she sustained bodily injuries. *See*, Mot. Summ. J. Hr'g Tr. 5:11-17 (Nov. 28, 2018); *see also*, Progressive policy.

c. At that time, Ms. Pitts was the co-owner of a different motor vehicle (a 2014 Kia Cadenza) insured by a State Farm Mutual Automobile Insurance Company ("State Farm") insurance policy that provided PIP coverage and which met the security requirements of Section 627.733. However, Ms. Pitts was not a listed named insured, unlisted resident relative, or unlisted omnibus insured under that State Farm insurance policy. *See*, Mot. Summ. J. Hr'g Tr. 5:18-20 (Nov. 28, 2018); *see also*, State Farm policy.

d. As a permissive driver of the vehicle involved in the accident, Ms. Pitts was not a listed named insured, or an unlisted resident relative under the Progressive insurance policy. *See*, Mot. Summ. J. Hr'g Tr. 8:2-4, 8:14-25 (Nov. 28, 2018); *see also*, Progressive policy.

e. The Progressive insurance policy for the vehicle involved in the accident contained an exclusion which purports to exclude PIP coverage for certain persons. *See*, Mot. Summ. J. Hr'g Tr. 8:2-17 (Nov. 28, 2018); *see also*, Progressive policy.

4. Importantly, the parties disagree as to whether Ms. Pitts is qualified as an ***unlisted omnibus insured*** under the Progressive insurance policy for the vehicle involved in the accident. Ms. Pitts contends that she is qualified to be an unlisted omnibus insured, and Progressive contends that she is not.

5. In its order, this Court concluded that Progressive's insurance policy language "specifically excludes coverage to parties not listed on the subject policy who own a motor vehicle to which security was required under the Florida Motor Vehicle No-Fault Law," that Ms. Pitts "was such a party in this action," and that, therefore, Progressive "has no liability to" Ms. Pitts.

6. As explained below, the Plaintiff's undersigned attorneys believe that this Court misapprehended or overlooked the controlling law, and reached the wrong result. Under controlling Florida law and the plain language of Progressive's insurance policy, Ms. Pitts was covered as an unlisted omnibus insured. Alternatively, to the extent, if any, that Progressive's insurance policy language purports to exclude PIP coverage to Ms. Pitts as an unlisted omnibus insured, that insurance policy unlawfully provides less than the minimum level of PIP coverage required by Florida law.

7. This motion and the arguments herein are made in good faith, after a thorough analysis and with the undersigned attorneys' genuine belief in the merits of this motion and with confidence that this Court desires and intends to honor the law and achieve the correct result.

B. <u>As a permissive driver of the Cruze, applicable Florida law requires Ms. Pitts to be deemed an unlisted omnibus insured under the Progressive insurance policy</u>

8. In Florida, PIP insurance is governed by the "Florida Motor Vehicle No Fault Law" (i.e., §§ 627.730 – 627.7405, Fla. Stat.), which includes Section 627.736, Florida Statutes (the "PIP statute").

9. PIP insurance coverage is statutorily required coverage necessary for a motor vehicle insurance policy to comply with the security requirements of the Florida Motor Vehicle

No–Fault law. *Flores v. Allstate Ins. Co.*, 819 So. 2d 740, 744 (Fla. 2002); *see also* § 627.736(1), Fla. Stat. (1997); *Allstate Ins. Co. v. Rudnick*, 761 So.2d 289, 291 (Fla.2000). "PIP benefits are an integral part of the no-fault statutory scheme." *Flores*, 819 So. 2d at 744. PIP insurance is required to provide $10,000 of coverage for medical bills and lost wages without regard to fault. *See, e.g.*, §§ 627.731 and 627.736(1)(a), Fla. Stat. "Accordingly, the PIP statute sets forth a basic coverage mandate: every PIP insurer is required to—that is, the insurer 'shall'—reimburse eighty percent of reasonable expenses for medically necessary services. This provision is the heart of the PIP statute's coverage requirements." *Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.*, 141 So. 3d 147, 155 (Fla. 2013).

10. Importantly, a pedestrian, or a person operating or riding in an insured motor vehicle may be entitled to PIP coverage as an "omnibus" insured, even though that person is not specifically listed in an insurance policy as a named insured or as a relative of a named insured. *See, Pearson v. State Farm Mut. Auto. Ins. Co.*, 560 So. 2d 416, 418 (Fla. 2d DCA 1990) (insurer of vehicle in which passenger was injured was required to provide PIP protection to passenger, even though she was co-owner of another vehicle that was insured under policy that did not provide her with PIP coverage); *O'Quinn v. Seibels, Bruce & Co.*, 447 So. 2d 369, 370 (Fla. 1st DCA 1984) (passenger of insured vehicle "would appear to be an 'omnibus insured' under the terms of the policy in that the policy agrees to pay personal injury protection benefits to any person occupying the insured vehicle who sustains accidental injury while within the vehicle"); *Romero v. Progressive Southeastern Insurance Co.*, 629 So.2d 286, 287 (Fla. 3d DCA 1993) (omnibus insureds have been identified in Florida as permissive users in automobile liability insurance contracts); *Prygrocki v. Industrial Fire and Cas. Ins. Co.*, 407 So.2d 345, 345 (Fla. 4th DCA 1981), *approved*, 422 So. 2d 314 (Fla. 1982).

("pedestrian struck by insured motor vehicle was an omnibus insured under PIP coverage of insurance policy").

11. The Second DCA's decision in *Pearson* is directly on-point and controlling. In that case, the plaintiff was the co-owner of a vehicle that was insured by State Farm. Although the plaintiff's vehicle was insured by State Farm, the plaintiff was not personally insured by the State Farm insurance policy. The plaintiff was injured while riding as a passenger in a different vehicle that was insured by Allstate. In that situation (which is identical in all material respects to the case at bar), the Second DCA held that Allstate was required to provide PIP protection to the plaintiff, even though she was co-owner of another vehicle that was insured under a State Farm insurance policy that did not provide her with PIP coverage. Because this Court's order does not mention *Pearson*, it appears that this Court has overlooked it or misapprehended its applicability.

12. As explained by the Second DCA in *Pearson*, "[t]he goal behind the enactment of the no-fault law was to provide a comprehensive system of coverage for **all people operating or riding in motor vehicles.**" *Id.*, 560 So.2d at 418 (emphasis added).

13. In this case, Ms. Pitts is the co-owner of a motor vehicle (the Kia), and that vehicle is insured by State Farm, but she is not an insured under the State Farm insurance policy. As explained by the Second DCA:

> The Florida motor vehicle no-fault law does **not** require all owners to be listed as named insureds on policies which insure a specific motor vehicle. Indeed, the definition of "named insured" expressly recognizes that an owner may not always be a named insured. § 626.732(2), Fla.Stat. (1987) [sic[1]]. Hence, State Farm was not cNot yetontractually or statutorily required to insure Pearson, and she was not entitled to recover ***from State Farm.***

[1] The *Pearson* decision has a typo which erroneously cited to Section **626**.732(2), but the applicable definition is actually found in Section **627**.732(2). The same definition is still found in the current version of Section 627.732(2). Both the 1987 version and the current version of Section 627.732(2) define a "named insured" as "a person, ***usually the owner of a vehicle***, identified in a policy by name as the insured under the policy." (Emph. added). Thus, as noted by the Second DCA in *Pearson*, "an owner may not always be a named insured." *Id.*, 560 So. 2d at 418.

Pearson, 560 So. 2d at 417-418 (emph. added).

14. The Second DCA also explained in *Pearson* that "the requirement of section 627.733(1) that each owner must 'maintain security' ... mean[s] that each owner must be sure the car is insured. It does **not** require each owner to buy a separate policy." *Id.,* 560 So. 2d at 418 (emph. added).

15. Notably, the *Pearson* case involves the same situation as the case at bar, where the plaintiff was injured while she was occupying a vehicle with PIP coverage, but she was the co-owner of an insured vehicle and the insurance policy for that vehicle did not insure her. The Second DCA described the facts as follows:

> The appellant, Teresa Pearson, was the co-owner, along with her fiance, Robert E. Taylor, of an Oldsmobile car. Taylor carried PIP coverage on the vehicle with State Farm ... under a policy which listed him as the named insured. Pearson, who had no driver's license and allegedly did not drive, was not listed as an additional named insured under Taylor's policy.
>
> On February 13, 1988, Pearson was injured while a passenger in Lucinda Calloway's Chevrolet. Calloway carried PIP insurance on her vehicle with Allstate Insurance Company.
>
> Pearson sought coverage from both companies, and both denied coverage. Eventually she sued State Farm and Allstate contending that one of them had to pay her PIP benefits. State Farm argued that it was not responsible because her name was not on the policy as an insured, she did not come under the omnibus definition of insured, and although living in Taylor's household, she was not a relative. Allstate, on the other hand, contended that it was not liable because Pearson was the owner of a vehicle required to have insurance.

Pearson, 560 So. 2d at 417. Again, the situation in this case is materially identical to that in *Pearson,* Progressive (like Allstate) contends that it is not liable because Ms. Pitts was the owner of another vehicle that is required to have PIP insurance. As in *Pearson,* Ms. Pitts' own vehicle is insured but the insurance policy for that insured vehicle does not insure her.

16. Just like Allstate did in the *Pearson* case, Progressive is contending in this case that Ms. Pitts is not covered based on the exception described in Section 627.736(4)(e)4.a. In *Pearson*, the same statutory exception provision appeared in the 1987 version of Section 627.736(4)(d)4.a. This provision was renumbered to (4)(e)4.a in 2007. *See,* § 20, Ch. 2007-324, Laws of Fla. (2007). Thus, at this point, it is helpful to review what the PIP statute states.

17. Subsections (1) and (4) of the PIP statute expressly provide and require broad mandatory PIP coverage and benefits to omnibus insured vehicle occupants, as follows:

> (1) REQUIRED BENEFITS.— **An insurance policy complying with the security requirements of s. 627.733 must provide personal injury protection to** the named insured, relatives residing in the same household, **persons operating the insured motor vehicle, passengers in the motor vehicle,** and other persons struck by the motor vehicle and suffering bodily injury while not an occupant of a self-propelled vehicle, subject to subsection (2) and paragraph (4)(e), **to a limit of $10,000 in medical and disability benefits and $5,000 in death benefits resulting from bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle**
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> . . . . .
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> (4) PAYMENT OF BENEFITS.
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> . . . . .
>
> (e) **The insurer of the owner of a motor vehicle shall pay personal injury protection benefits for:**
>
> 1. Accidental bodily injury sustained in this state by the owner while occupying a motor vehicle, or while not an occupant of a self-propelled vehicle if the injury is caused by physical contact with a motor vehicle.
>
> 2. Accidental bodily injury sustained outside this state, but within the United States of America or its territories or possessions or Canada, by the owner while occupying the owner's motor vehicle.
>
> 3. Accidental bodily injury sustained by a relative of the owner residing in the same household, under the circumstances described in subparagraph 1. or subparagraph 2., if the relative at the time of the accident is domiciled in the owner's household and is not the owner of a motor vehicle with respect to which security is required under ss. 627.730-627.7405.
>
> 4. **Accidental bodily injury sustained in this state by any other person while occupying the owner's motor vehicle** or, if a resident of this state,

while not an occupant of a self-propelled vehicle **if** the injury is caused by physical contact with such motor vehicle, if the injured person is **not**:

a. **The owner of a motor vehicle with respect to which security is required under ss. 627.730-627.7405**; or

b. Entitled to personal injury benefits from the insurer of the owner of such a motor vehicle.

§ 627.736(1) and (4), Fla. Stat. (emph. added).

18. At first blush, one could conceivably argue that Section 627.736(4)(e)4.a excludes PIP coverage to Ms. Pitts because she is a co-owner of a vehicle for which security is required under Sections 627.730-627.7405. However, closer examination confirms that Ms. Pitts is required by the PIP statute to be covered as an "omnibus" insured under the Progressive insurance policy. We know this for certain because, in *Pearson*, the Second DCA explained the meaning of former Section 627.736(4)(d)4.a (now 627.736(4)(e)4.a) in relation to the same exact facts of this case, and held that the plaintiff was indeed entitled to PIP coverage:

> The goal behind the enactment of the no-fault law was to provide a comprehensive system of coverage **for all people operating** or riding in motor vehicles. ... The statute requires an owner of a motor vehicle to provide this coverage, and the owner is typically covered by that policy because the owner is also the named insured. **The issue presented by this case only arises when the owner's car has appropriate PIP coverage but that coverage does not protect the owner as an insured. We believe that the exception to coverage provided in [former] section 627.736(4)(d)(4)(a) [now 627.736(4)(e)4.a.], only applies if the owner required to have insurance has failed to arrange for its purchase. It does not apply when the required insurance has been purchased and simply does not insure the owner.**

Pearson, 560 So.2d at 418 (emph. added). Thus, the exception in Section 627.736(4)(e)4.a does **not** apply and cannot be lawfully applied to Ms. Pitts in this case, because "the required insurance has been purchased [for the car she owns (the Kia)] and simply does not insure [her]."

19. Progressive's insurance policy language does not (and cannot lawfully) alter the outcome required by *Pearson*. First, the PIP statute imposes the **minimum** level of PIP coverage,

and therefore, an insurance company is **not** lawfully authorized to adopt any insurance policy language that purports to provide less than that minimum level of PIP coverage. *See, e.g., Nunez v. Geico Gen. Ins. Co.,* 117 So.3d 388, 392 (Fla. 2013) (the PIP statute "is mandatory" and conditions in an insurance policy that are contrary to that statute are "invalid"); *Custer Med. Ctr. a.a.o. Maximo Masis v. United Auto. Ins. Co.*, 62 So.3d 1089, n. 1 (Fla., 2011) (interpreting the offending PIP policy provisions vs. statutory limitations); *Flores v. Allstate Ins. Co.,* 819 So.2d 740, 745 (Fla.2002) (noting that courts have an obligation to invalidate exclusions on coverage that are inconsistent with the purpose of the statute that mandates the coverage); *Salas v. Liberty Mut. Fire. Ins. Co.,* 272 So.2d 1, 5 (Fla.1972) (insurance coverage that is a creature of statute is not susceptible to the attempts of the insurer to limit or negate the protection afforded by the law); *Mullis v. State Farm Mut. Auto. Ins. Co.,* 252 So.2d 229, 232–234 (Fla.1971) (automobile liability insurance and uninsured motorist coverage obtained to comply with or conform to the law cannot be narrowed by the insurer through exclusions and exceptions contrary to the law); *Diaz–Hernandez v. State Farm Fire & Casualty Co.,* 19 So.3d 996, 1000 (Fla. 3d DCA 2009) (insurance policy provision was invalid because it was against the public policy of the statute); *Vasques v. Mercury Cas. Co.,* 947 So. 2d 1265, 1269 (Fla. 5th DCA 2007) (insurance policy's restrictions on statutorily mandated PIP coverage that are inconsistent with purpose of statute are invalid).

20. Second, the plain language of Progressive's insurance policy exclusion provision is actually consistent with Section 627.736(4)(e)4.a. That insurance policy includes the following provisions pertinent to this lawsuit:

GENERAL DEFINITIONS

> The following definitions apply throughout the policy. Defined terms are printed in boldface type and have the same meaning whether in the singular, plural, or any other form.
>
> . . . . .

14. "You" and "your" mean:

a. a person shown as a named insured on the declarations page; and

b. the spouse of a named insured if residing in the same household at the time of the loss.

. . . . .

PART II(A) - PERSONAL INJURY PROTECTION COVERAGE

INSURING AGREEMENT

If you pay the premium for this coverage, we will pay benefits that an **insured person** is entitled to receive pursuant to the Florida Motor Vehicle No-Fault Law, as amended, because of bodily injury:

1. caused by an accident;

2. sustained by an **insured person**; and

3. arising out of the ownership, maintenance or use of a motor vehicle.

. . . .

ADDITIONAL DEFINITIONS

When used in this Part II(A):

. . . . .

5. **"Insured person" means:**

a. you or any resident relative sustaining bodily injury while occupying a motor vehicle, or when struck by a motor vehicle while not occupying a self-propelled vehicle;

b. **any person sustaining bodily injury while occupying a covered auto**; or

c. any person, if a resident of Florida, sustaining bodily injury when struck by a covered auto while not occupying a self-propelled vehicle.

. . . . .

EXCLUSIONS - READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS PART II(A).

Coverage under this Part II(A) does not apply to bodily injury:

. . . . .

4. sustained by any person, other than you, if such person is the owner of a motor vehicle with respect to which security is required under the Florida Motor Vehicle No-Fault Law, as amended;

See, Insurance Policy at p. 2, 7-9 (emph. added). The above-quoted exclusion contained in paragraph 4 on page 9 of the insurance policy obviously corresponds to the exception to PIP coverage authorized by Section 627.736(4)(e)4.a. As explained by the Second DCA in *Pearson*, that exception does not apply when the required PIP insurance has been purchased for a vehicle owned by the plaintiff, but does not insure the owner." *Id.*, 560 So.2d at 418.

21. To the extent that Progressive contends that the above-quoted exclusion contained in paragraph 4 on page 9 of the insurance policy is more restrictive than the exception to PIP coverage authorized by Section 627.736(4)(e)4.a, the policy provision is invalid as a matter of law. *See, e.g., Nunez,* 117 So.3d at 392; *Custer* 62 So.3d at n. 1; *Flores,* 819 So.2d at 745; *Salas,* 272 So.2d at 5; *Mullis,* 252 So.2d at 232–234; *Diaz–Hernandez,* 19 So.3d at 1000; *asques,* 947 So. 2d at 1269.

22. Thus, the undisputed material facts demonstrate that Ms. Pitts is an "omnibus" insured under the Progressive insurance policy and is entitled to PIP coverage as a matter of law.

23. It appears that this Court has been misled or confused by Progressive's argument that the exclusion in its insurance policy can independently stand alone or supersede the minimum level of coverage required by the PIP statute. Progressive erroneously argued that *Pearson* is inapplicable to this instant case because the Second DCA only opined about the terms and limitations of the PIP statute, rather than relying on an analysis of the insurance policy under which the plaintiff sought coverage. As such, Progressive suggests that it somehow has the authority to provide less than the statutorily required minimum level of PIP coverage. That suggestion is without merit and has misled this Court into error, in direct conflict with the Second DCA's on-

point and controlling decision in *Pearson*, and numerous published appellate decisions which hold that an insurance policy cannot provide less than the minimum amount of PIP coverage required by Section 627.736.

D. Conclusion

24. As explained above, the undisputed material facts demonstrate as a matter of law that Ms. Pitts is entitled to PIP coverage as an "omnibus" insured under Progressive's insurance policy. The Second DCA's on-point and controlling decision in *Pearson* absolutely confirms that the exception in Section 627.736(4)(e)4.a and the similar provision in Progressive's insurance policy do not (and cannot) apply to exclude or restrict the minimum level fo coverage mandated by Section 627.736(1)(a).

25. Therefore, this Court should grant rehearing, vacate the "Final Order Granting Defendant, Progressive Select Insurance Company's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgement" dated January 28, 2019, grant Ms. Pitts' motion for summary judgment, and deny Progressive's motion for summary judgment.

WHEREFORE, Plaintiff, Marissa Pitts Mills, respectfully requests this Honorable Court to grant rehearing, vacate the "Final Order Granting Defendant, Progressive Select Insurance Company's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgement" dated January 28, 2019, grant Ms. Pitts' motion for summary judgment, and deny Progressive's motion for summary judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail to Joel E. Bernstein, Esquire (Joel@bernstein-chackman.com; Nancy@bernstein-chackman.com), 4000 Hollywood Blvd., Suite 600, Hollywood, Florida 33021 and Michael E.

Bringuier (Michael_E_Bringuier@progressive.com; TampaPIPHC1@progressive.com), 600 N. Westshore Boulevard, Suite 300, Tampa, Florida 33609, on this 5th day of February, 2019.

Respectfully submitted,

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