IN THE SUPREME COURT

OF FLORIDA

CASE NO. 78,856

MICHAEL MANSFIELD and MARY GROSS MANSFIELD

Petitioners, Cross-Respondents,

vs.

ROSA RIVERO and FREDERICO RIVERO

Respondents, Cross-Petitioners,

DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Case Nos. 89-1941; 89-1851

PETITIONERS', CROSS RESPONDENTS' CONSOLIDATED REPLY BRIEF ON THE MERITS AND SUPPLEMENTAL APPENDIX

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CITATION OF AUTHORITIES

OTHER AUTHORITIES

POINT I

PETITIONERS' POINT ON DISCRETIONARY REVIEW

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH HEIDENSTRAUCH v. BANKERS INS. CO., 564 So.2d 581 (Fla. 4th DCA 1990), rev. den., 576 So.2d 287 (Fla. 1990); BENNETT v. FLORIDA FARM BUREAU CAS. INS. CO., 477 So.2d 608 (Fla. 5th DCA 1985); McCLELLAN v. INDUSTRIAL FIRE & CAS. INS. CO., 475 So.2d 1015 (Fla. 4th DCA 1985); IOWA NAT. MUT. INS. CO. v. WORTHY, 447 So.2d 998 (Fla. 5th DCA 1984).

ARGUMENT

RESPONDENTS' ARGUMENT OVERLOOKS THE OBVIOUS CONFLICT

The District Court of Appeal held that an injured party who does not cross the threshold requirement of §627.737(2) is still entitled to collect his PIP deductible from the tortfeasor. This conflicts with §627.739 and with the following decisions:

Heidenstrauch v. Bankers Ins. Co., supra, clearly held that §627.739 precludes an injured party who does not cross the threshold requirements of §627.737(2) from recovering the PIP deductible from the exempt tortfeasor[1].

Iowa Nat. Mut. Ins. Co. v. Worthy, 447 So.2d 998 (Fla. 5th DCA 1984) held that where the threshold requirements in §627.737(2) Fla.Stat. have not been met, the tortfeasor and his liability

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[1]In so holding, the Heidenstrauch Court adopted the reasoning in Verdecia v. American Risk Assurance Co., 543 So.2d 321 (Fla.3d DCA 1989), rev. den., 551 So.2d 464 (Fla. 1989) which held that the statutory provision eliminating the tort remedy against the tortfeasor for the PIP deductible is constitutional because there is a reasonable alternative provided for the entire automobile no-fault scheme i.e., prompt payment for a reasonable portion of the damages sustained by the injured party. The Verdecia Court noted that the PIP deductibles have a ceiling of $2,000.00, the insured pays less of a premium for the required PIP coverage and the insured is substantially, although not totally, compensated by PIP for the damages he sustains. Petitioners cite this merely because Heidenstrauch specifically adopted this rationale. Petitioners do not rely upon Verdecia to demonstrate conflict because it is also from the Third District Court of Appeal.

carrier are liable to the injured party for 20% of the medical expenses not payable under the PIP coverage provided by §627.736(1)(a) and 40% of lost gross income and earning capacity not payable under the PIP coverage provided by §627.736(1)(b) Fla.Statutes.

McClellan v. Industrial Fire & Cas. Ins. Co., 475 So.2d 1015 (Fla. 4th DCA 1985) following Worthy held that where a plaintiff fails to reach the threshold of permanent injury, he is still entitled to sue the tortfeasor for benefits not payable under §627.736(1) i.e., 20% of his medical expenses and 40% of his lost gross income.

Bennett v. Florida Farm Bureau Cas. Ins. Co., 477 So.2d 608 (Fla. 5th DCA 1985) also following Worthy held that a tortfeasor is liable to an injured party for the percentage of medical expenses and lost wages not payable under PIP coverage and for any amount of bills which exceed the statutory limits without regard to the threshold requirements of §627.737(2).

RESPONDENTS' ARGUMENT ALSO OVERLOOKS THE PURPOSE OF PIP INSURANCE AND THE REASON FOR THE DEDUCTIBLES AND THEIR CONTINUED APPROVAL.

The purpose and the benefits of the PIP insurance were stated by this Honorable Court in Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974), as follows: "a lessening of the congestion of the court system, a reduction in concomitant delays in court calendars, a reduction of automobile insurance premiums and an assurance that persons injured in vehicular accidents would receive some economic aid in meeting medical expenses and the like, in order not to drive them into dire financial circumstances with the possibility of swelling the public relief rolls." The No-Fault

Law also "assures prompt payment of out-of-pocket losses to a large group and reduces greatly the likelihood of the filing of suits..." It is a reasonable alternative.

Chapman v. Dillon, 415 So.2d 12 (Fla. 1982) discussed the deductible amounts authorized under §627.739 as follows:

> We do not agree with the district court's conclusions about the statute. Lowering PIP benefits and increasing the amount of permitted optional deductibles will not necessarily result in reduced compensation and increased litigation. Many 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. The benefits from these collateral sources are often more than sufficient to pay for the expenses not included in the PIP coverage. Thus motorists entitled to these collateral benefits would receive full compensation without needing to file a suit.
>
> Furthermore we do not find anything in Lasky to indicate that that decision was predicated upon a motorist's being insured for the full amount of his medical expenses and lost income. Instead 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.
>
> > 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. In exchange for his previous right to damages for pain and suffering (in the limited class of cases where recovery of these elements of damage is barred by §627.737), with recovery limited to those situations where he he can prove that the other party was at fault, the injured party is assured of recovery of his major and salient economic losses from his own insurer.

> Lasky v. State Farm Insurance Co., 296 So.2d at 13-14 (emphasis in original). Hence it was the fact that injured parties were assured prompt recovery of their major and salient economic losses, which this Court found dispositive in Lasky.

The purpose of a deductible allows drivers to save on their premiums by reducing their coverage, "Senate Staff Analysis And Economic Statement" CS/SB 1181 June 7, 1977.

The propriety of the deductibles was again recognized in International Bankers Ins. v. Arnone, 552 So.2d 908 (Fla. 1989) and Govan v. International Bankers Ins. Co., 521 So.2d 1086 (Fla. 1988). Arnone held that the functional purpose of a deductible, frequently referred to as 'self-insurance', is to alter the point as to which an insurance company's obligation to pay will ripen.

Thus, the purpose of PIP is to enable injured parties to recover their major and salient economic losses, promptly from their own insurer. This is accomplished by purchasing PIP coverage with a selected deductible at a reduced premium.

RESPONDENTS' ARGUMENT WHICH ATTEMPTS TO SUPPORT REIMBURSEMENT OF THE DEDUCTIBLE FROM THE EXEMPT TORTFEASOR IS INVALID.

Initially, Respondents cite Industrial Fire & Cas. Ins. Co. v. Kwechin, 447 So.2d 1337 (Fla. 1983) which held that an insurer which sells a PIP policy containing a deductible ($4,000.00) knowing that the prospective insured does not have other collateral insurance or benefits is liable to the insured as if the policy contained no deductible. At that time §627.739 allowed deductibles in the amount of $250, $500, $1,000, $2,000, $3,000 and $4,000 and imposed on the insurer the duty to explain to each applicant or policy holder that if they had coverage under private or govern-

mental disability plans, they may avail themselves of the deductible or modifications as provided in §627.739(1),(2) and (3).

Kwechin does not govern for numerous reasons: (1) the insurance agent writing the policy had actual knowledge that Kwechin had no collateral coverage; (2) §627.739 (1977) required an insurer who offered a deductible to applicants for insurance or a renewal to explain to them that if they had coverage under private or governmental disability plans they may avail themselves of a deductible or other modifications as set forth in §627.739; (3) §627.739 was later amended to provide for deductibles in the lower amounts of $250, $500, $1,000 and $2,000 and was also amended to eliminate the insurer's duty to inquire into the existence of other coverage under private or governmental disability plans before offering a deductible. Therefore, Kwechin was based upon a different set of facts and a different statute and does not govern.

Respondents' reliance upon Fortune Ins. Co. v. McGhee, 571 So.2d 546 (Fla. 2d DCA 1990) is also misplaced. McGhee merely held that a PIP deductible can be exhausted by payments from other sources including workers' compensation coverage and need not be exhausted by payments from the claimant's personal funds. The Court in so holding noted parenthetically that they had not overlooked the fact that §627.739 had been amended after the Kwechin decision but the Court believed that the amendment to the statute did not alter the legislative purpose of the statute. Again, McGhee is based upon a different factual situation, discusses a different issue and therefore does not govern.

Respondents rely heavily upon one sentence in the decision of the District Court of Appeal in Kwechin v. Industrial Fire & Cas.

Co., 409 So.2d 28 (Fla. 3d DCA 1981) which stated: ". . . In our view, the overriding purpose of the statute is to assure complete insurance coverage for injuries." While this parenthetical statement was apparently cited with approval in Fortune Ins. Co. v. McGhee, supra its accuracy is in great doubt.

The purpose of the No-Fault statute is to assure injured parties recovery of their major and salient economic losses. Chapman v. Dillon, supra. However, as stated in Chapman there was nothing in Lasky to indicate that the decision was predicated upon the motorist being insured for the full amount of his medical expenses and lost income. Therefore, Respondents' reliance upon this one contradictory sentence from the District Court's opinion in Kwechin [which was not cited with approval by this Court in its Kwechin decision at 447 So.2d 1337 (Fla. 1983)] is misplaced.

This Court has never held that in order for the No-Fault Act to be constitutional full reimbursement is a necessity. As stated in Chapman v. Dillon, supra, the amended §627.736, §627.737 and §627.739 which lowered the PIP benefits and raised the permissible PIP deductible are constitutional and do not violate the rights of access to the court, due process or equal protection. The injured party still recovers most of his out-of-pocket expenses from his own insurer and is allowed to bring suit for the remainder. The amount of PIP coverage that is provided is sufficient to prevent a party from being forced into dire financial circumstances and accepting unduly small settlements. Thus, in most instances the legislature's objectives of obtaining insurance, at a reduced premium, in return for prompt recovery of major expenses without protracted litigation are still being met. Therefore, Respondents' reliance upon one sentence of the Kwechin decision from the

District Court concerning complete insurance coverage is incorrect.

Respondents argue that individuals should be treated no differently than an insurance company and that since a health insurer has the right to intervene in a lawsuit to pursue its subrogation rights, an individual should also be allowed to obtain reimbursement of the deductible from the tortfeasor. This argument overlooks the clear wording of §627.739(1) which states that any person electing a deductible shall have no right to claim or recover any amount so deducted from any third person who is exempt from tort liability by reason of the No-Fault Act. This immunity from liability for reimbursement is a factor in determining the risk involved and the amount of the premium to be charged.

The argument is also erroneous because the purpose of the No-Fault Act is not to obtain full reimbursement of all medical expenses and loss of gross income and earning capacity. Rather, it is to obtain recovery of most of an insured's out-of-pocket expenses from his own insurer at a reduced premium instead of being forced to file suit against a third party tortfeasor resulting in delay, the burden of proving negligence and a reduction in the net recovery because of his own attorney's fees. The benefits under the No-Fault Act far outweigh the fact that an injured party cannot obtain reimbursement of his selected deductible from the tortfeasor unless he crosses the threshold.

The distinction between No-Fault insurance and health insurance was discussed by this Court in Blue Cross & Blue Shield of Fla. v. Matthews, 498 So.2d 421 (Fla. 1986) as follows:

> ...The statute in question is contained in the Florida Motor Vehicle No-Fault Law, section 627.730, which establishes the no-fault concept between motor vehicle insurers. This is equitable and beneficial to such insurers

> because each insurer receives both benefits and detriments; in other words, losing the right to sue other motor vehicle insurers is washed out by gaining the right not to be sued by other such insurers. This equitable arrangement breaks down, however, if the other insurer is a health insurer. The arrangement becomes a one-way transaction with the health insurers always transferring money to the vehicle insurers. The motor vehicle insurance industry would benefit from transferring part of its claims cost to the health insurance industry which might, conceivably, result in lower vehicle insurance rates. However concerned it was with high motor vehicle insurance rates, we do not believe the legislature intended to disguise the costs of such insurance by transferring part of the burden to the health insurance industry and its customers.

Thus, Respondents' argument overlooks the basic difference between PIP and health insurance and the fact that the premiums for PIP coverage are reduced because of the selected deductible which is not recoverable from an exempt tortfeasor. These factors along with the reduction in litigation costs are passed along in the form of reduced premium benefits to the insureds. On the other hand, health insurance carriers charge higher premiums and their coverage plans are usually more extensive.

Respondents' reliance upon Purdy v. Gulf Breeze Enterprises, Inc. 403 So.2d 1325 (Fla. 1981) is misplaced. It is true that this Court stated that there was nothing in the law which prevents injured persons from waiving their rights to receive insurance benefits and suing the tortfeasor for the full amount of the damages. However, this does not lend support to Respondents' argument that they should be entitled to reimbursement of the deductible amount from an exempt tortfeasor where they received

PIP benefits from their own carrier -- promptly paid without any litigation costs and at a reduced premium which was made possible in part by the deductible and also by the fact that the exempt tortfeasor is not liable for reimbursement of a deductible. The benefits obtained by the tortfeasor enure to their insurance carrier and to Respondents. Purdy. Therefore, comparison of the right of a health insurer to obtain subrogation based upon Blue Cross & Blue Shield of Florida v. Matthews, supra and §627.739(1) may be analogized to attempting to compare apples with oranges.

Respondents' reliance upon McKee v. City of Jacksonville, 395 So.2d 222 (Fla. 1st DCA 1981) is misplaced inasmuch as it deals with §627.7372 (Fla. 1977), the collateral source rule, which is entirely distinguishable from §627.739(1) which deals with deductibles in a PIP policy.

Respondents' reliance upon Erie Ins. Co. v. Bushy, 394 So.2d 228 (Fla. 5th DCA 1981) is also misplaced. In Bushy the Court rejected appellant's argument that it was entitled to a "set-off" of $5,000.00 because appellee failed to carry no-fault insurance and therefore was a self-insurer under §627.733(1). The decision was based upon Erie's liability policy which did not differentiate between whether the injured person did or did not have insurance. Contrary to Respondents' statement Petitioners' argument is not similar. Bushy is based on the enforcement provision of §627.733(1). It must be remembered that Bushy did not receive PIP benefits. She was forced to file suit and prove negligence and proximate cause in order to recover and then her award was reduced by attorney's fees. Nor did she receive the PIP benefits of prompt payment. The difference is obvious.

In Stephens v. Renard, 487 So.2d 1079 (Fla. 5th DCA 1986) the

Court held that it was error to reduce plaintiff's damage award for her failure to obtain PIP. Again, Stephens does not aid Respondents because it was based on Bushy which dealt with the enforcement provision of §627.733(1). It is also uncertain whether plaintiff met the threshold and since plaintiff had not purchased PIP she did not receive any of the PIP benefits of prompt payment of most of her expenses without expenditure of attorney's fees.

Respondents erroneously rely upon Ward v. Nationwide Mutual Fire Ins. Co., 364 So.2d 73 (Fla. 2d DCA 1978). In Ward two injured passengers, who did not carry PIP on their own vehicles, were allowed to recover under the medical payments coverage section of the owners' policies. The Court based its decision on the language of the two policies and on the fact that a separate premium had been paid for the optional medical payments coverage. The Court stated that failure to obtain PIP benefits imposed personal liability upon the owners and loss of No-Fault tort immunity (§627.733) and penalties under §627.735.

Again, merely because the Court declined to hold that §627.733 makes an owner a self-insurer of PIP benefits to himself does not mean that Respondents who received PIP benefits are entitled to recover their deductible from an exempt tortfeasor contrary to §627.739. As in Bushy and Stephens, Ward dealt with the enforcement provision of §627.733. It did not discuss §627.739. The decision is based on the fact that the medical pay provision, paid for by a separate premium, did not exclude coverage to persons who failed to purchase PIP coverage.

Respondents argue that Petitioners' request this Court to punish an injured person who has a PIP deductible by making him a self insurer for those bills while a person who does not have PIP

insurance is allowed to sue the at-fault party for medical bills. This is erroneous. The answer to this is simple: (1) §627.733 deals with the enforcement provisions of the No-Fault Act, or the liabilities of an individual who fails to purchase PIP insurance; (2) §627.733 does not set forth the rights of an individual who does not have PIP insurance; (3) Erie v. Bushy, supra, Stephens v. Renard, supra, and Ward v. Nationwide, supra, dealt with §627.733, the enforcement provision, and did not discuss the rights of said individual under §627.739; (4) regardless of any enforcement provision, if an individual does not have PIP coverage or if an individual waives his right to receive PIP benefits and sues the tortfeasor he will not receive the benefits of PIP insurance i.e., prompt payment of medical bills and loss of gross income and gross earning capacity regardless of whether he caused the vehicular accident. On the contrary, he will have chosen to sue the tortfeasor, prove negligence and proximate cause, withstand any comparative negligence defense and have his verdict, if any, decreased by payment of attorney's fees and diminished by perhaps years of delay. The reasonable alternative embodied in the No-Fault Act will have been lost by an individual's lack of wisdom and foresight to purchase PIP and/or wisdom and foresight to claim PIP benefits under a policy. Contrary to Respondents' argument, Petitioners do not seek to punish anyone. The individual will have punished himself!

POINT II

CROSS PETITIONERS' POINT ON DISCRETIONARY REVIEW

WHETHER THE TRIAL COURT COMMITTED HARMFUL PREJUDICIAL ERROR IN REFUSING TO CHARGE THE JURY THAT THE WORDS "PERMANENT INJURY" AS USED IN THE FLORIDA NO FAULT LAW INCLUDES PERMANENT SUBJECTIVE COMPLAINTS OF PAIN

ARGUMENT

Petitioners/Cross Respondents [MANSFIELD] submit that the decision[2] of the District Court of Appeal does not create conflict jurisdiction with any other decision and is correct on the merits.

As the decision states the evidence was in direct conflict. Both sides introduced evidence on whether or not ROSA had sustained permanent injury.[3]

The failure to instruct the jury that permanent injury included subjective complaints was so insignificant and, in effect a non-issue, that RIVEROS' counsel did not even mention it in closing argument to the jury. On the contrary, he only said:

> There are two issues that you are going to be asked to decide. One is whether there is a permanent injury. Sometimes that term means impairment or disability. It is used by different names. Basically what we are talking about is, has the plaintiff suffered something which the doctors within a reasonable degree of medical probability feel is permanent. If you do not feel that to be the case, then you have to decide on the reasonable or necessary medical bills and/or lost wages which the plaintiff is entitled to... (R.414,415)

Subsequently in rebuttal argument RIVEROS' counsel told the jury that ROSA had received two permanent injuries -- "one is

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[2]Reported at 584 So.2d 1012 (Fla. 3d DCA 1991) and included in the Supplemental Appendix (SA.1-4).

[3]RIVEROS' witnesses testified she had a permanent injury based on AMA and American Psychiatrists Association guidelines (P.18,19, T.97,102,272,273). MANSFIELDS' witness, Dr. Turbin, testified that ROSA did not have an objective sign of injury and in the absence of an objective sign he does not give a disability rating (T.170, 172,173). He readily admitted that other board certified orthopedic surgeons disagreed with his opinion (T.173).

physically documented by two Board-certified orthopedic surgeons and the other is psychiatric. When you see on that verdict form has she received a permanent injury, in searching for the truth and serving as the conscience of this community, the answer is yes ..." (T.447,448).

The instruction sought by RIVEROS based upon the receded from majority opinion in Jones v. Smith, 547 So.2d 201 (Fla. 3d DCA 1989) would have been erroneous. Assuming the medical witnesses were divided as to whether a permanent injury could be based upon subjective complaints alone and the Court had instructed the jury that a permanent injury could be based upon subjective complaints alone, this instruction would have constituted a comment on the evidence. It would also have instructed the jury to disregard the testimony of the medical witnesses who stated that in their opinion permanent injury could not be based solely upon subjective complaints.

The District Court correctly stated inter alia:

> ...Consequently, the jury's obligation was to decide the weight to be given the evidence, a matter within the jury's province. An instruction permanent injury includes permanent subjective complaints of pain incorrectly informs the jury that under the statute permanent pain is always permanent injury. In effect, such an instruction directs the jury to disregard the testimony of defense medical experts and is tantamount to the court directing a verdict for plaintiffs on the issue of permanent injury. See Gencorp, Inc. v. Wolfe, 481 So.2d 109 (Fla. 1st DCA 1985). The court's instruction tracking the language of the statute was appropriate because it properly informed the jury that its obligation was to determine whether the plaintiff had sustained a permanent injury within a reasonable degree of medical probability, in light of all the testimony. We therefore affirm the final judgment...

The decision does not conflict with Johnson v. Phillips, 345 So.2d 1116 (Fla. 2d DCA 1977). Johnson does not hold that a jury must be instructed that a permanent injury under Florida Statute §627.737(2) includes permanent subjective complaints of pain resulting from an initial organic injury or that permanent subjective complaints of pain alone constitute permanent injury. In fact, Johnson did not even mention jury instructions.

Rather, Johnson merely holds that permanent subjective complaints of pain resulting from an organic injury will satisfy the threshold requirements of §627.737(2). It is still for the medical experts to determine whether a party has received a permanent injury. The jury must then determine the credibility of the medical experts and the other evidence.

The decision does not conflict with Patterson v. Wellcraft Marine, 509 So.2d 1195 (Fla. 1st DCA 1987), or Fuster v. Eastern Airlines, Inc., 545 So.2d 268 (Fla. 1st DCA 1988) or Florida Sheriffs Youth Fund v. Harrell, 438 So.2d 450 (Fla. 1st DCA 1983). These cases hold that a deputy in a workers' compensation case can rely on a physician's expert witness opinion, which utilizes experience in treating a claimant, to find permanent disability without relying upon a medical manual or guide. The trial court did not prevent the RIVEROS from introducing all their evidence. Rather, based on all the conflicting evidence and a proper instruction the jury simply decided that ROSA had not sustained a permanent injury.

CONCLUSION

It is respectfully submitted that this Honorable Court should hold that Respondents are not entitled to recover their deductible

from Petitioners, the exempt tortfeasors. It is also respectfully submitted that the jury was properly instructed in accordance with §627.737(2) and the requested instruction would have been an improper comment on the evidence.

Respectfully submitted,

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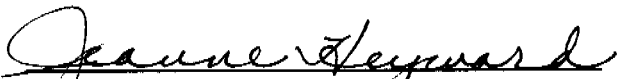
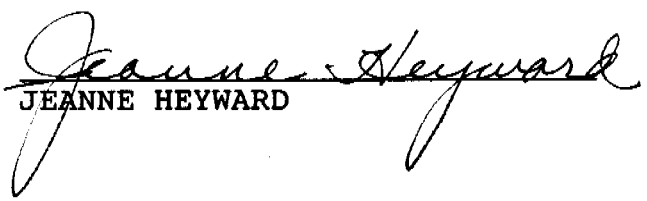


JEANNE HEYWARD
Fla. Bar No. 035812

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to GARY E. GARBIS, P.A., 701 S.W. 27th Avenue, Suite 1000, Miami, Florida 33135 this 28th day of April, 1992.



JEANNE HEYWARD

A P P E N D I X

conversion, and since Goodwin made that recovery under count five, the trial court's summary judgment denying recovery for conversion was harmless error. Hiers interprets our remand on the conversion count as suggesting that Goodwin can recover damages in the conversion claim over and above the $5,862.21 damages awarded under the count for breach of escrow duty. We make no suggestion regarding the amount, if any, recoverable under count seven. Upon further proceedings after remand, an award, if any, may be made for less, the same, or more than the $5,862.21 awarded on count five. Our intent was and is to ensure that, if liability is found under the conversion count, a double recovery under the two counts does not occur. We simply have set aside the trial court's summary judgment and remanded for further proceedings on that count.

2. Hiers also points out that we overlooked the case management order that required the $1,744.83 in Hiers' trust account to remain there pending the outcome of Alexatos' counterclaim. It was not brought to our attention in the briefs, and while we do make an effort to remain cognizant of the entire record on appeal, we expect the parties to bring to our attention those matters that they believe are significant. We feel certain that the parties will bring to the attention of the trial court that this sum must be disbursed by subsequent order, at which time the trial court can determine the appropriate recipient and award the proper credit.

The remaining requests for clarification and rehearing are denied.

GOSHORN, C.J., and COBB, J., concur.

Rosa RIVERO and Frederico Rivero, Appellants,

v.

Michael MANSFIELD and Mary Gross Mansfield, Appellees.

Nos. 89-1941, 89-1851.

District Court of Appeal of Florida, Third District.

April 23, 1991.

Rehearing Denied Sept. 27, 1991.

Automobile accident victim brought action against tort-feasors for damages. The Circuit Court, Dade County, Thomas Carney, J., entered judgment on jury verdict awarding amount of victim's unpaid medical bills and finding that victim had not sustained permanent injury but, subsequently, entered amended final judgment reducing amount of damages awarded. Victim appealed. The District Court of Appeal, Baskin, J., held that: (1) while, in some cases, permanent pain may constitute "permanent injury" within meaning of no-fault law provision for recovery of damages for pain, suffering, mental anguish and inconvenience, fact finder must base its decision as to permanence on all testimony and evidence; (2) court's instruction on permanent injury appropriately tracked language of statute; (3) victim, whose carrier had refused to provide benefits in connection with accident, were not required to seek recovery from carrier rather than from tort-feasors; and (4) victim was not required to subtract amount of insurance deductible from jury award.

Affirmed in part; reversed in part; remanded.

1. Automobiles ⇐251.17

While, in some cases, permanent pain may constitute "permanent injury" within meaning of no-fault law provision for recovery of damages for pain, suffering, mental anguish and inconvenience, fact finder must base its decision as to permanence on all testimony and evidence; per-

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manent pain is not always "permanent injury." West's F.S.A. § 627.737(2).

See publication Words and Phrases for other judicial constructions and definitions.

2. Automobiles ⇐251.18

Requested instruction that words "permanent injury," as used in no-fault law, included permanent subjective complaints of pain resulting from initial organic injury, was properly refused in action arising from automobile accident, as it would effectively have directed jury to disregard testimony of defense medical experts and would have been tantamount to court directing verdict for plaintiffs on issue of permanent injury. West's F.S.A. § 627.737(2).

3. Automobiles ⇐251.18

Trial court's instruction appropriately tracked language of no-fault law provision allowing recovery of damages for pain, suffering, mental anguish, and inconvenience in event of permanent injury in action arising from automobile accident, as it properly informed jury that its obligation was to determine whether plaintiff had sustained "permanent injury" with reasonable degree of medical probability, in light of all testimony. West's F.S.A. § 627.737(2).

4. Automobiles ⇐251.18

Insureds whose carrier had refused to provide them any benefits in connection with automobile accident were not required to seek recovery from carrier rather than from tort-feasors.

5. Automobiles ⇐251.17

Automobile accident victim was not required to subtract amount of insurance deductible from jury award in action against tort-feasors. West's F.S.A. § 627.739(1).

Gary E. Garbis, Miami, for appellants.

Goodhart, Rosner, Simon, Greenberg & Humbert, Jeanne Heyward, Miami, for appellees.

Before SCHWARTZ, C.J., and BARKDULL, HUBBART, NESBITT, BASKIN, FERGUSON, JORGENSON, COPE, LEVY, GERSTEN and GODERICH, JJ.

ON CONSIDERATION EN BANC

BASKIN, Judge.

Rosa Rivero and Frederico Rivero, her husband, appeal a final judgment and amended final judgment. We affirm the final judgment and reverse the amended final judgment.

The Riveros sued Mary and Michael Mansfield for damages for injuries Rosa sustained in an automobile accident. The Riveros alleged that as a result of her injuries Rosa was in constant pain that left her unable to work and caused her to become deeply depressed. At trial, the Mansfields admitted liability. The trial proceeded on the issues of damages and whether the Riveros crossed the permanent injury threshold requirement of section 627.737(2), Florida Statutes (1983). According to the Riveros' medical experts' testimony, Rosa's permanent pain constituted a permanent injury; however, the Mansfields' medical experts testified that she did not sustain a permanent injury.

At the close of trial, the Riveros, relying on *Johnson v. Phillips*, 345 So.2d 1116 (Fla. 2d DCA 1977), requested the court to instruct the jury: "The words 'permanent injury,' as used in the Florida No-Fault Law, include permanent subjective complaints of pain resulting from an initial organic injury." The trial court rejected the Riveros' requested instruction. Instead, it instructed the jury: "In this case, the plaintiff does allege a permanent injury. Therefore, in order to recover in the case, the plaintiff must prove by the greater weight of the evidence that she has sustained a permanent injury within reasonable medical probability." The jury returned a verdict in the Riveros' favor, awarding them the uncontested amount of Rosa's unpaid medical bills, but finding that Rosa had not sustained a permanent injury. Consequently, the trial court entered a final judgment in accordance with

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the jury verdict. The Mansfields then requested the court to reduce the judgment by 80% pursuant to section 627.737, Florida Statutes (1983). The trial court granted the motion and entered an amended final judgment for the reduced amount. The Riveros filed this appeal.

[1-3] The Riveros argue that the trial court erred in failing to give the requested instruction. We disagree, and in so doing, recede from our decision in *Jones v. Smith*, 547 So.2d 201 (Fla. 3d DCA 1989).[1] Section 627.737 permits a plaintiff to recover damages for pain, suffering, mental anguish, and inconvenience "only in the event that the injury consists in whole or in part of: ... (2) Permanent injury within a reasonable degree of medical probability." § 627.737(2), Fla.Stat. (1983). The statute does not define permanent injury, but requires that permanent injury be established within reasonable medical probability. Rosa testified that she suffers permanent pain. Although she introduced expert medical testimony that such pain constitutes permanent injury, defendants' medical experts testified that Rosa does not have a permanent injury. Consequently, the jury's obligation was to decide the weight to be given the evidence, a matter within the jury's province. An instruction that permanent injury includes permanent subjective complaints of pain incorrectly informs the jury that under the statute permanent pain is always permanent injury. In effect, such an instruction directs the jury to disregard the testimony of defense medical experts and is tantamount to the court directing a verdict for plaintiffs on the issue of permanent injury. *See Gencorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985). The court's instruction tracking the language of the statute was appropriate because it properly informed the jury that its obligation was to determine whether the plaintiff had sustained a permanent injury within a reasonable degree of medical probability, in light of all the testimony. We therefore affirm the final judgment.

[4] For the following reasons, however, we reverse the amended final judgment in which the court reduced the jury's award. The Mansfields maintain that the court properly reduced the judgment because the Riveros have the option of suing their insurance carrier to require it to provide coverage. That argument is not persuasive. Nothing in the law "prevents injured persons from waiving their rights to receive insurance benefits and suing the tortfeasor for the full amount of their damages." *Purdy v. Gulf Breeze Ent., Inc.*, 403 So.2d 1325, 1329 (Fla.1981); *Blue Cross & Blue Shield of Fla. v. Matthews*, 498 So.2d 421, 422 (Fla.1986). The record establishes that the Riveros' insurance carrier has refused to provide them any benefits; no rule requires them to recover from the carrier.

[5] Finally, we are not convinced by appellees' assertion that section 627.739(1), Florida Statutes (1983), requires the subtraction of the amount of the Riveros' deductible from the jury award. Section 627.739(1), contains no mandate that a tortfeasor's obligation to pay damages be reduced by the amount of the victim's deductible. "[T]he overriding purpose of the statute is to assure complete insurance coverage for injuries." *Kwechin v. Industrial Fire & Cas. Co.*, 409 So.2d 28, 30 (Fla. 3d DCA 1981), *approved*, 447 So.2d 1337 (Fla. 1983);[2] *see generally International Bankers Ins. Co. v. Arnone*, 552 So.2d 908 (Fla.1989). Appellees have not provided any authority to support their unorthodox proposition; we therefore decline their invitation to so construe the statute. For these reasons, the amended final judgment

1. In *Jones v. Smith*, 547 So.2d 201 (Fla. 3d DCA 1989), we held that the trial court had committed reversible error in refusing plaintiff's request to instruct the jury that in section 627.737(2) "the words permanent injury include subjective complaints obtained resulting from an initial organic injury." *Jones*, 547 So.2d at 201. Although in some cases, permanent pain may constitute permanent injury, the factfinder must base its decision as to permanence on all the testimony and evidence.

2. Subsequent amendments to section 627.739 have not altered the legislative purpose of the statute. *Fortune Ins. Co. v. McGhee*, 571 So.2d 546 (Fla. 2d DCA 1990).

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is reversed, and the cause remanded to the trial court to reinstate the final judgment.

The remaining points on appeal lack merit.

Affirmed in part; reversed in part; remanded.

Anthony SPURLOCK, Petitioner,

v.

The Honorable Michael F. CYCMANICK, Circuit Court Judge, etc., Respondent.

No. 91-29.

District Court of Appeal of Florida, Fifth District.

June 20, 1991.

Rehearing Denied Sept. 12, 1991.

Defendant petitioned for writ of prohibition to prevent trial court from trying him on felony charge of aggravated battery. The District Court of Appeal, Diamantis, J., held that speedy trial discharge on lesser included misdemeanor charge did not bar prosecution for felony offense which was grounded upon same conduct or criminal episode, when latter prosecution was filed within 180 days following arrest.

Relief denied.

Cowart, J., dissented and filed opinion.

1. **Criminal Law** ⇐577.16(10)
Double Jeopardy ⇐92

Speedy trial discharge on lesser included misdemeanor charge did not bar prosecution for felony offense which was grounded upon same conduct or criminal episode, when latter prosecution was filed within 180 days following arrest. West's F.S.A. RCrP Rule 3.191(h)(1), (i)(3).

2. **Double Jeopardy** ⇐59

Defendant was never placed in jeopardy on misdemeanor battery charge because county court never empanelled and swore in jury to try charge, and thus subsequent prosecution for felony aggravated battery, arising out of same conduct or criminal episode, was not barred by double jeopardy. U.S.C.A. Const.Amend. 5.

3. **Criminal Law** ⇐577.10(9)

Aggravated battery defendant waived speedy trial right absent evidence rebutting showing of nonavailability; defendant had failed to appear at arraignment, and was available for trial now only after having been extradited from another state. West's F.S.A. RCrP Rule 3.191(a, e).

4. **Criminal Law** ⇐1134(3)

Appellate courts should not inject issues into case that have not been raised by parties unless issues constitute fundamental error.

Joseph DuRocher, Public Defender, and William C. Hancock, II, Asst. Public Defender, Orlando for petitioner.

Robert A. Butterworth, Atty. Gen., Tallahassee and Anthony J. Golden, Asst. Atty. Gen., Daytona Beach, for respondent.

DIAMANTIS, Judge.

The petitioner, Anthony Spurlock, pursuant to rule 9.030(b)(3) of the Florida Rules of Appellate Procedure, has requested that this court issue a writ of prohibition to prevent the respondent, The Honorable Michael F. Cycmanick, from trying petitioner on a felony charge of aggravated battery. We issued a stay order. After consideration of the petition, we conclude that the petition is without merit. Accordingly, we deny the petition and vacate the order staying the trial court proceedings.

Petitioner claims that to try him on this felony would constitute double jeopardy and violate his right to a speedy trial under rule 3.191(a)(1) of the Florida Rules of Criminal Procedure. The record shows that petitioner was first charged with misdemeanor battery and that while that

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