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' BRIEF ON THE MERITS AND APPENDIX

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TOPICAL INDEX

	PAGE
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	14
POINT INVOLVED - ARGUMENT	16
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).	
CONCLUSION	20
CERTIFICATE OF SERVICE	21

CITATION OF AUTHORITIES

	PAGE
Bennett v. Florida Farm Bureau Cas. Ins. Co., 477 So.2d 608 (Fla. 5th DCA 1985)	14,19
Chapman v. Dillon, 415 So.2d 12 (Fla. 1982)	17
Govan v. International Bankers Ins. Co., 521 So.2d 1086 (Fla. 1988)	18
Heidenstrauch v. Bankers Ins. Co., 564 So.2d 581 (Fla. 4th DCA 1990), rev. den., 576 So.2d 287 (Fla. 1990)	14,18
International Bankers Ins. v. Arnone, 552 So.2d 908 (Fla. 1989)	18
Iowa Nat. Mut. Ins. Co. v. Worthy, 447 So.2d 998 (Fla. 5th DCA 1984)	14,18
Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974)	16
McClellan v. Industrial Fire & Cas. Ins. Co., 475 So.2d 1015 (Fla. 4th DCA 1985)	14,19
Verdecia v. American Risk Assurance Co., 543 So.2d 321 (Fla. 3d DCA 1989), rev. den., 551 So.2d 464 (Fla. 1989)	18

OTHER AUTHORITIES

	PAGE
§627.736(1), Fla.Stat. (1983)	19
§627.736(1)(a), Fla.Stat. (1983)	14,19
§627.736(1)(b), Fla.Stat. (1983)	14,19
§627.737, Fla.Stat. (1983)	1,14
§627.737(1), Fla.Stat. (1983)	1
§627.737(2), Fla.Stat. (1983)	1,16,18,19
§627.739, Fla.Stat. (1983)	2,14,16,17,18,19
§627.739(1), Fla.Stat.(1983)	1,2,14,16

STATEMENT OF THE CASE AND FACTS

Petitioners/Cross Respondents/Appellees/Defendants[1], MICHAEL MANSFIELD and MARY GROSS MANSFIELD, file this brief on the merits to review a portion of the decision of the Third District Court of Appeal which reversed the Amended Final Judgment on the ground that §627.739(1) Fla.Stat. (1983) does not require the subtraction of the amount of the RIVEROS' PIP deductible from the jury award even though the jury determined that ROSA RIVERO had not sustained a permanent injury and therefore had not satisfied the requirements of §627.737(2) Fla.Stat. (1983) (A.1-5, R.55).

The jury returned a verdict in favor of RIVEROS, determined that ROSA RIVERO had not sustained a permanent injury and awarded them the uncontested amount of unpaid medical bills of $3,405.00 (R.42-43, T.407). The trial court entered a Final Judgment for this amount (R.54).

The MANSFIELDS moved to reduce the Final Judgment of $3,405.30 by 80% because the RIVEROS had available PIP insurance medical benefits (R.47,48). The trial court then entered an Amended Final Judgment which reduced the Final Judgment to $681.06 which represented the amount of unpaid medical bills reduced by 80% pursuant to §627.737(1) Fla. Stat. (1982) (R.47-48,55).

The District Court affirmed the Final Judgment and reversed the Amended Final Judgment and held that the Final Judgment should not be reduced pursuant to §627.737.

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[1]The parties will be referred to as they stand before this Honorable Court and the symbol "R" signifies Record On Appeal and "T", transcript of proceedings.

The District Court also held that §627.739(1) did not mandate that an exempt tortfeasor's obligation to pay damages be reduced by the amount of the injured party's own deductible. Stated otherwise, the Court held that even though the "tort threshold" requirement is not met, the injured party is still allowed to recover his PIP deductible from the exempt tortfeasor. This is contrary to four Florida decisions cited in the Point and §627.739.

THE FACTS

On January 3, 1985 ROSA RIVERO was involved in an automobile accident when a vehicle driven by MARY GROSS MANSFIELD, struck the rear of RIVERO'S Cadillac (T.15,16,24). Officer Heath who investigated the accident testified that when he arrived at the scene ROSA was seated in her vehicle complaining of neck pain (T.19,20,26).

LISSETTE RIVERO, a daughter who was a passenger in her mother's vehicle at the time of the accident, said that her mother did not lose consciousness at the scene and was not cut (T.51,62, 63). She complained of pain in her leg (T.63). After the accident her mother immediately walked back to the MANSFIELD vehicle (T.63).

MARY GROSS MANSFIELD testified that after the accident ROSA RIVERO walked over to her car twice and asked her how she was (T.398). She said she was all right but after the police arrived she suddenly said "Oh, I'm hurt!", grabbed her neck and went back to her car (T.398,399).

There was a decided conflict in the evidence concerning ROSA'S injuries and whether or not she sustained a permanent injury as a result of the accident. The jury verdict which found that she had not sustained a permanent injury within reasonable medical probability is supported by the manifest weight of the evidence.

RIVEROS' witnesses testified that ROSA RIVERO received a permanent injury as a result of the accident:

Dr. Bustillo, orthopedic surgeon, initially examined ROSA RIVERO at Palm Springs Hospital on January 5, 1985, two days after the accident at which time she complained of neck and back pain (P.6)[2]. He said there was tenderness over the occipital area, bilateral, which is the base of the skull, muscle spasm and tenderness of the paravertebral muscles and her range of motion was painful and restricted (P.6,7). She sustained a flexion/extension injury to her neck and back (P.7,8). After her discharge from the hospital on January 6, 1985, he prescribed the standard treatment of bed rest, cervical traction and physical therapy (P.8-10).

Dr. Bustillo examined her in his office on January 22, 1985, February 5, 1985, March 22, 1985, July 11, 1985 and August 9, 1985 (P.10,11,13,14). On March 22, 1985 he discontinued physical therapy treatments and referred her to Dr. Rodriguez for psychiat-

[2]Reference to Dr. Bustillo's video taped deposition which was filed with the District Court on May 7, 1990 shall be to "P" or the page numbers of his deposition.

ric treatment (P.28). When he next saw her on July 11, 1985 she did not indicate that she had received any other treatment or therapy to her neck or back (P.28,29).

He said that her x-rays taken in July 1985 revealed osteoarthritis and degenerative changes in the lumbar spine caused by the aging process which takes years to develop and causes pain (P.30,31). He stated she had soft tissue injury to her low back and there was nothing in his report to indicate that he told her to restrict her activities or that she missed any time from work (P.34,35).

Dr. Bustillo's final diagnosis was severe lumbar strain (P.15). He testified that she had a 5 percent permanent disability of the body as a whole based upon the AMA guidelines (P.18,19). He had not examined her since August 1985 and did not know her present condition (P.19,48).

Dr. Moya, orthopedic surgeon, examined ROSA once on June 15, 1988, three and a half years after the accident (T.73, 75,107,108). He did not find any muscle spasm in her cervical spine (T.110,111). There was mild muscle spasm in the thoracic and lumbosacral spine (T.112,113).

His diagnosis was a bilateral occipital nerve neuralgia, chronic cervical, thoracic and lumbosacral spine strain and sprain and bilateral sacroiliitis, myositis and fasciitis of the paraspinal musculature (T.93). X-rays of the neck showed mild arthritis and mild osteoarthritic changes in the cervical and lumbar spine which pre-existed the accident and were normal for a

50 year old person (T.89,118,119).

Dr. Moya said she had a 5 percent permanent impairment of the body as a whole as a result of her injuries based upon the AMA Guides For Permanent Impairment Of The Body As A Whole and the American Academy of Orthopedic Surgeons Permanent Impairment Booklet rating (T.97,102). Dr. Moya said she could do almost anything she did before the accident with the exception that she may have an exacerbation as a result of her activity (T.98).

Dr. Rodriguez, psychiatrist, initially treated ROSA RIVERO on March 12, 1985 at Dr. Bustillo's request (T.235,238). He diagnosed her condition as chronic major depressive neurosis (T.241,249). He said that she could not function as a normal person because she was always crying, feeling desperate, bored, pessimistic and complaining (T.241,242). He testified that she had a 10% psychiatric disability (T.249,253,254).

On cross examination Dr. Rodriguez admitted that he had not conferred with any of the doctors who treated her before this accident nor had he obtained their records (T.257,258,260).

ROSA had not told Dr. Rodriguez that she had a mediastinal mass or tumor which would constitute a reason for depression (T.261). He diagnosed her as of having a post-traumatic stress disorder and depressive neurosis (T.262).

He testified that on the date of his report of July 30, 1986, ROSA appeared to be much improved from the post-traumatic stress disorder and depressive neurosis (T.271, 272). On that date he said she had a 5% impairment based upon the guidelines of the

American Psychiatrist Association (T.272,273).

The evidence established that ROSA had been treated on a regular basis by Dr. Camara from July 1986 to February 1988 and was taking Xanax which is an anti-depressant and prescribed for anxiety associated with depression (T.281,283).

MANSFIELDS' witnesses testified that ROSA RIVERO had not received a permanent injury as a result of the accident:

Dr. Turbin, orthopedic surgeon, performed an independent medical evaluation on ROSA on August 14, 1985, one week after Dr. Bustillo had discharged her (T.141,144,180).

His examination revealed that she had a normal range of motion in her neck, back and extremities, and some tenderness upon palpation in her low back and neck (T.149,150). There was no evidence of neurological damage to the nerves or muscle spasm in the neck or areas related to the neck (T.151).

Although she complained of pain in her lower back, he could not find any spasm upon palpation (T.152). There was no evidence of difference in the right and left side and no evidence of muscle weakness or nerve damage in her extremities (T.152,153). Based upon his examination and review of x-rays he said there was no objective sign of injury to her neck or back (T.154,157). He was unable to find evidence of any orthopedic disability or impairment resulting from the accident or that Plaintiff was restricted in her activity based upon the American Medical Association Guidelines for

Evaluation of Permanent Impairment (T.157-159).

On cross examination by RIVEROS' counsel, Dr. Turbin testified that unless there is an objective finding to corroborate complaints of pain, 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).

Dr. Castiello, a psychiatrist, examined ROSA on January 26, 1988 (T.191,193). Dr. Castiello reviewed the pre-accident records of Dr. Camara which revealed that she had gastrointestinal problems in December 1978 and Dr. Camara had prescribed tranquilizers and prior to that time she was taking antidepressant medicine and mild tranquilizers for anxiety (T.197).

Dr. Castiello said that during her examination she kept on talking about feeling sad all the time and talked about all the problems she was having at the present time. She repeated herself (T.200). When he asked her about the details of the accident and how she was injured, she began to talk about her daughter and the reason for the trip that day (T.201). In other words, she rambled on about her daughter, her interest in becoming an artist but she never told him what happened at the time of the accident (T.201).

When he asked her again to summarize all her complaints and symptoms, she came up with new complaints of numbness in her hands, seeing stars, inability to drive on the expressway, shortness of breath, tension and then the problems that were bothering her family and bothering everybody and that she had considered suicide (T.202). When he attempted to explore the suicide issue and

whether she had ever attempted to harm herself, she became angry and said "of course not." (T.203). He said that it was obvious that he was dealing with somebody who was maladjusted emotionally and used to play with this kind of never-ending complaints and symptoms (T.203). He thought that it was convenient for her to put the blame on the accident for whatever was happening or had happened since (T.203).

He said that based upon his examination he did not believe that she had any psychiatric problems as a result of the automobile accident in January 1985 and that she had suffered from a neurotic process which evolved throughout her life (T.205,206).

On cross examination, Dr. Castiello said that she had a psychiatric permanent impairment which was not effected by the accident (T.218). He said that she exhibited a self-serving attempt to create a nervous problem around the accident and to blame an inconsequential accident for everything that happened from an emotional point of view in her life (T.219). He said that she exaggerated her complaints from the accident and was suffering from anxiety but not true depression (T.219,220).

Dr. Wilensky, orthopedic surgeon, examined ROSA on January 8, 1988 (R.58,61). Her prior history included a mass in her chest since 1983 with complaints of back and chest pain at the site of the mass (R.63,64). The chest x-ray confirmed a mass on the right side of the media sternum (R.65).

He examined dorsal spine films which were normal (R.65). The lumbar spine x-ray revealed a congenital transitional vertebrae

which is a malformation of the lower vertebrae L-5 (R.65). A cervical spine x-ray taken on January 4, 1985 was normal (R.66).

Dr. Wilensky ordered x-rays of the cervical and lumbar spine (R.67). The x-rays of the cervical spine was normal (R.67,68). The x-rays of the lumbar spine revealed a congenital transitional vertebrae (partially fused) on the right side (R.68). Apart from that, the x-ray was normal (R.69).

He did not find any orthopedic evidence of permanent residual injury within reasonable medical probability (R.79,80). Nor did he find any reason she could not do housework or an accounting type of job (R.80,81).

ROSA RIVERO'S testimony concerning permanent injury, and inability to work and lead a normal life was subjected to proper cross examination and properly rejected by the jury:

In addition to the above medical witnesses, the RIVEROS presented the following additional testimony:

FREDERICO RIVERO testified that before the accident his wife never complained of her neck or back or had any mental problems (T.297,298,300). He said that she worked at the school, at home and in his business (T.301-303). The business paid her $200 a week (T.304). After the accident she has been unable to work and earn her regular salary in the family business, and he hired somebody to do her job (T.304). Since the accident she always complains of pain in her neck and back, is unhappy, angry and upset, does not

like to go out and he often finds her crying or very depressed when he comes home at night (T.304-308).

On cross examination Mr. RIVERO said his wife has not worked since the accident (T.308, 309). However, she signed checks for the business after the accident and the Employer's Quarterly Wage Report ending March 31, 1985 listed ROSA as an employee who had worked 10 weeks in that quarter (T.308-313,317). On deposition he had stated that she had not worked for the corporation since the accident but still received $200 a week from the corporation (T.313,314). He attempted to explain this on redirect examination by stating that this was a mistake and he should have answered in the negative (T.314,315,318,319).

Mercedes Rivero, a friend of ROSA in New Jersey, testified that before the accident ROSA never complained of neck or back pain nor did she have any emotional problems (T.31-32,34). She said before the accident she worked in a cafeteria and she and her husband began a cleaning office business and she also worked in her own home and yard (T.34).

However, after the accident she complained all the time, is a nervous wreck and appears to be in constant pain (T.36). She is unable to do the things around the house she did before the accident, cries and is depressed and distressed all the time (T.36-38). She also argues with her children and her husband (T.38,39). She is afraid to drive, and has not worked since the accident (T.44,45,47).

LISSETTE RIVERO, ROSA'S 20 year old daughter, testified that

since the accident her mother is a totally different person, cries on many occasions, is unable to lift furniture and complains about why her life has changed so much (T.56-58). She said she takes a lot of pills and is very nervous (T.59). She tries to work in the family business but her mind is "totally like gone" (T.59). She begins to clean the floor and then leaves the job half done, and then begins to cook and then leaves the cooking, and then realizes that she didn't finish the job (T.59,60). Before the accident she cut the lawn and took care of the gardening but since the accident she has continuous back pain and nervous problems (T.61).

ROSA testified that she never had a neck, back or emotional problems prior to the accident (T.337,339,340). After coming to Miami in 1973 she worked at the cafeteria in West Hialeah washing pots (T.338). She then took a part time job with a maintenance company (T.338). In 1980 she and her husband started a maintenance business (T.338). Before the accident she helped her husband in the business by preparing invoices, distributing business cards, vacuuming, and moving furniture (T.341,342).

After the accident she said she was confused and was unable to work on the invoices, clean rugs or do any type of heavy cleaning (T.342,343). As a result, her husband was forced to hire a bookkeeper to do her job (T.342). She testified that she was paid either between $175 and $200 a week before the accident (T.348). She received paychecks for a period of time following the accident (T.348).

ROSA testified that as a result of the accident from a mental

or emotional point of view her life has been disgraced, ruined and her life has been completely changed (T.354). She is unable to take care of her home as she did before the accident (T.354); she does not get along with her husband as she did nor does she have the same relationship with her children (T.354-356). Parties and music make her sad (T.356). She does not do gardening (T.356).

However, on cross examination MANSFIELDS' counsel elicited the fact that her last therapy treatment from Dr. Bustillo was on March 22, 1985, three or four months after the accident (T.367, 368); the only reason she saw Dr. Moya was for a second opinion (T.368,371,385); and three years lapsed between the time she last saw Dr. Bustillo and her appointment with Dr. Moya (T.369).

She testified that she never had emotional problems before the accident (T.337,378); that Dr. Camara's diagnosis of anxiety on April 24, 1984 was "not necessarily anxiety" (T.378); and she had a "flutter in her stomach . . . but that's not necessarily due to nervous problems" (T.378). She also admitted that she has a mediastinal mass and possible surgery exploration was suggested (T.376,377). Since it did not bother her, Dr. Camara told her it was probably congenital and not to worry about it (T.377,378). She also emphatically stated that all her problems with depression and nervousness were due to the accident, not anything in the past (T.381).

Helga Morales testified that in 1987, 1988 and 1989 she went to a laundromat in Hialeah every week and saw ROSA there in late 1988 (T.390-392). She said that her own seven year old son tried

to help ROSA clean the laundromat (T.391). ROSA cleaned the washing machines and the dryers and mopped (T.391). She said that she saw her at the laundromat five or six times and that every time ROSA was either cleaning the machines or mopping, or cleaning the area (T.391,392). The longest time she ever saw her was for 15 or 20 minutes before 10:00 p.m. (T.393). She saw her actually mop once or twice and the rest of the time she used a cloth to clean a window (T.394).

Under proper instructions, the jury determined that ROSA had not sustained a permanent injury within reasonable medical probability as a result of the accident and had not lost any wages as a direct and proximate result of the accident (R.42,43). The total amount of reasonable and necessary unpaid medical expenses of $3,405.30 had been agreed upon by the parties (R.42-43).

The RIVEROS filed a motion for a new trial (R.44-46) and the MANSFIELDS filed a motion for reduction of medical bills (R.47-48).

The trial court denied RIVEROS' Motion For New Trial (R.49) and entered a Final Judgment in favor of the RIVEROS in the amount of $3,405.00, the stipulated amount of unpaid medical bills (R.54, T.407).

Subsequently the trial court ruled that because RIVEROS had not exhausted all their PIP benefits the MANSFIELDS were entitled to an 80% reduction of the unpaid medical bills and entered an Amended Final Judgment in favor of the RIVEROS in the amount of $681.06 which is the amount of the unpaid medical bills reduced by 80% pursuant to §627.737(1) (R.47,48,51,55).

The District Court of Appeal, Third District, affirmed the Final Judgment but reversed the Amended Final Judgment. The District Court held that the judgment should not be reduced pursuant to §627.737 and that §627.739(1) does not mandate that an exempt tortfeasor's obligation to pay damages be reduced by the amount of the injured party's own deductible (A.1-5).

The District Court denied MANSFIELDS' Motion For Rehearing, Motion For Rehearing En Banc and Motion To Certify (A.6-16).

SUMMARY OF ARGUMENT

Petitioners contend that the decision of the District Court of Appeal, Third District, ignores the clear wording of §627.739(1) and 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); and Iowa Nat. Mut. Ins. Co. v. Worthy, 447 So.2d 998 (Fla. 5th DCA 1984).

These decisions, following §627.737 and §627.739, hold that if the injured party does not meet the "tort threshold" then his recovery from the exempt tortfeasor is limited to 20% of medical expenses not payable under PIP coverage 627.736(1)(a) and 40% of the lost gross income and earning capacity not payable under PIP coverage 627.736(1)(b). He is not allowed to recover his PIP deductible from the exempt tortfeasor.

The decision of the District Court of Appeal, Third District, which holds that an injured party who does not meet the threshold requirement is allowed to recover his PIP deductible from the exempt tortfeasor ignores the statute and conflicts with these decisions.

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

The District Court of Appeal held that an injured party who does not cross the threshold requirements of §627.737(2) is still entitled to collect his PIP deductible from the tortfeasor even though §627.739 forbids it and the above decisions, following the statute, prohibit it.

PERTINENT STATUTE

> **627.739. Personal injury protection; optional limitations; deductibles**
>
> (1) The named insured may elect a deductible to apply to the named insured alone or to the named insured and dependant relatives residing in the same household, but may not elect a deductible to apply to any other person covered under the policy. Any person electing a deductible or modified coverage, or subject to such deductible or modified coverage as a result of the named insured's election, shall have **no** right to claim or to recover any amount so deducted from any owner, registrant, operator, or occupant of a vehicle or any person or organization legally responsible for any such person's acts or omissions who is made exempt from tort liability by ss. 627.730-627.7405. [emphasis supplied.]

Initially, it must be noted that the constitutionality of the personal injury protection coverage (PIP) was upheld in Lasky v.

State Farm Insurance Company, 296 So.2d 9 (Fla. 1974) and Chapman v. Dillon, 415 So.2d 12 (Fla. 1982). The purchase 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 deductible amounts authorized under §627.739 has been upheld by this Honorable Court in Chapman v. Dillon, supra as follows:

> 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 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.

The decision of the Third District Court of Appeal ignores the clear language of §627.739 and conflicts 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[3].

Iowa Nat. Mut. Ins. Co. v. Worthy, supra held that where the threshold requirements in §627.737(2) Fla.Stat. have not been met, the tortfeasor and his liability carrier are liable to the injured party for 20% of the medical expenses not payable under the PIP

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[3]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 because it is also from the Third District Court of Appeal.

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., supra following Worthy held that where an injured party 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., supra 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).

None of these decisions allow a party who has not met the tort threshold to recover his PIP deductible from the exempt tortfeasor.

The decision of the District Court of Appeal which held that even though the RIVEROS had not satisfied the threshold requirements they could still recover from the MANSFIELDS (the exempt tortfeasors) their PIP deductible is contrary to the above decisions as well as §627.739.

CONCLUSION

Based upon the reasons and authorities set forth above, it is respectfully submitted that an express and direct conflict exists and this Honorable Court should hold that Respondents/Cross Petitioners, the RIVEROS, are not entitled to recover the amount of their deductible from Petitioners/Cross Respondents, the MANSFIELDS, the exempt tortfeasors.

Respectfully submitted,

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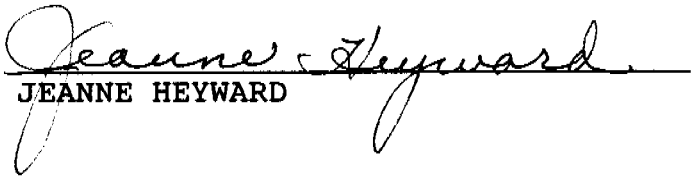

JEANNE HEYWARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 13th day of March, 1992 to: GARY E. GARBIS, P.A., 701 S.W. 27th Avenue, Suite 1000, Miami, Florida 33135.

Jeanne Heyward

JEANNE HEYWARD

A P P E N D I X

I N D E X

	PAGE
Rivero v. Mansfield, 584 So.2d 1012 (Fla. 3d. DCA 1991)	A-1

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1991

ROSA RIVERO and FREDERICO RIVERO, **

Appellants, **

vs. ** CASE NOS. 89-1941
89-1851

MICHAEL MANSFIELD and MARY GROSS MANSFIELD, **

Appellees. **

Opinion filed April 23, 1991.

Appeals from the Circuit Court for Dade County, Thomas Carney, Judge.

Gary E. Garbis, for appellants.

Goodhart, Rosner, Simon, Greenberg & Humbert; Jeanne Heyward, 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 116 (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 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.

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,

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[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.

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.

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.

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 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.

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[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).