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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

RESPONDENTS', CROSS PETITIONERS' BRIEF ON THE MERITS AND APPENDIX

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TOPICAL INDEX

CITATION OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF CASE AND FACTS

This cause is before this Honorable Court pursuant to the Court granting Certiorari jurisdiction on both Petitioner and Respondent-Cross Petitioners points presented for consideration. The issues for consideration are whether a plaintiff in an automobile accident subject to the "Florida No Fault Law" may recover against the tortfeasor the actual unpaid medical bills whether or not a permanent injury is found to exist by the jury, and secondly whether a plaintiff who has what medical doctors refer to as "soft tissue" injuries which do not leave objective signs of injury after the acute stage is entitled to an instruction that subjective complaints of pain may form a basis for a finding that a plaintiff has suffered a permanent injury.

The case itself opened with the Defendant admitting liability for the automobile accident (T3). Thereafter, a discussion arose with the trial Judge on the subject of medical bills. The defense acknowledged to the trial Court that certain medical bills remained outstanding since there had been a "PIP" cutoff (T3). There also was a $2,000.00 deductible to the PIP policy in this case (T7). The defense argued to the Trial Court that Plaintiff could sue post judgment in a separate action for unpaid medical bills and thus secure a double recovery. The Plaintiff at trial suggested that all medical bills be placed in evidence and any "set-off" as required by any Florida Statute or pursuant to any decision of this or any Appellate Court be taken up post trial (T3-7). The stipulated medical bills were three

thousand, four hundred and five dollars and thirty cents ($3,405.30). The trial Judge post trial reduced this amount by 80% and entered a final judgment for the remaining 20%.[1] The Third District, En Banc, disagreed with the trial Court and reinstated the jury award.

Concerning the issue of medical testimony which gave rise to the requested jury instruction the following evidence was before the jury. Plaintiff presented doctor Robert Moya (T74).

He is a board certified orthopedic surgeon, fellow of the Academy of Orthopedic Surgeons, who has practiced his specialty since 1975 (T74-75). He saw the Plaintiff on June 15, 1988. His history from Plaintiff reflected an injured neck and back by history (T76) his examination revealed tenderness of the trapezius musculature with complaints of radiating pain to the occipital area. He found tenderness of the neck to palpation (T77). The neck had a decreased range of motion (T81) and he explained his findings in terms of a microscopic injury (T81). He found in the thoracic spine and lumber spine disconetic motion to the last degree as well as loss of range of motion (T83). He found spasm and complaints of pain in the lumbar spine (T84). He found the patient complaining of pain on abduction of the hips and the lordotic curve was straightened (T87-89). His diagnosis was bilateral occipital nerve neuralgia, cervical, thoracic and lumbosacral sprain, sacroilitis, myositis and fasciitis, each of

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[1] The jury had found no permanent injury and awarded plaintiff the exact amount of $3,405.30 unpaid medical bills.

which can cause pain and all of which can come and go (T93-95). He indicated that each of the conditions was related to the accident and he determined she had a five percent (5%) permanent impairment (T96-97). He gave Plaintiff a cervical collar and medication.(T100) His bill for services was seven hundred forty dollars ($740.00) which he testified was reasonable and related to her care and treatment as a result of the accident (T105).

The next witness presented by Plaintiff was Dr. Bustillo (T128). Dr. Bustillo is a board certified orthopedic surgeon (D4) who was called in to treat Appellant at Palm Springs Hospital where she was taken form the accident scene and he thereafter followed and treated her. His diagnosis was that she had suffered a flexion extension injury to her neck and back (D7-8). He found objective signs of injury, i.e., spasm (D6/11/15) during the course of his treatment. He also determined that as a result of her accident she had sustained a permanent injury and he rated her as having sustained a five percent (5%) permanent impairment (D18). During the course of her treatment with him he found that she was depressed and crying and referred her to Dr. Rodriguez, a psychiatrist (D13)[2].

He described her condition as a severe sprain (15), wherein the muscle fibers and ligaments are stretched (D16). He admitted on cross that the injury she had is commonly referred to as a "soft tissue injury" (D34). He described Plaintiff as still

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[2] The symbol D refers to his deposition which was read into evidence.

having pain and restricted motion seven months after the accident (D42) when he last saw her.

The Defense called, out of turn, Dr. Turbin, who had seen Appellant on August 14, 1985, for Southern Diagnostic Association.[3] He found the Plaintiff to complain of pain in the neck and upper and lower back (T147). Dr. Turbin then was asked by Defense Counsel if he was familiar with the "AMA" Guidelines and the witness indicated that they are a "recognized authority" in the medical community (T157). In fact, he testified that the guide must be used as it is the "only way to determine permanency" (T158). In Plaintiff's case in his opinion she had no permanent injury or impairment (T158).

On cross-examination Dr. Turbin indicated that he will not rate a person as having a permanent injury unless they have objective signs of injury (T170). On the subject of back sprains or neck sprains he has never found a permanent injury present (T172).

Next, the Defense called, out of turn, Dr. Castiello, the Defense psychiatrist (T207). He was also asked about use of the AMA Guidelines and opined that this guide was authoritative in assessing permanent impairment (T206-207).

He saw Appellant on January 26, 1988 (T217). He determined that Appellant had a psychiatric problem that was permanent but all of it was unrelated to her accident of 1985 (T205-206).

Dr. Rodriguez, a psychiatrist who was treating the Plaintiff

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[3] The examining entity for Plaintiffs PIP carrier.

was called as the next witness (T236). He testified that he commenced to see and treat Appellant at the request of Dr. Bustillo (T238). His ultimate diagnosis of her condition was a chronic major depressive neurosis (T241/249). He determined that the depressive state of Appellant will cause her not to function properly at work or socially (T250-151). He determined that she had a ten percent (10%) impairment psychiatrically due to the accident (T256).

Lastly the Defense presented the testimony of Dr. Wilensky who had seen the Plaintiff at the request of the Defendant pursuant to the Rules of Procedure. His video deposition was played to the jury and placed in evidence. His opinion mirrored that of Dr. Turbin, to wit, that in accordance with the AMA Guide the Plaintiff had not suffered a permanent injury in that there was no objective sign of such.

Based on the foregoing trial testimony the jury was presented with the following presentation by the defense attorney in closing argument:

"Now, what else did we hear? You heard from both Dr. Turbin and Dr. Wilensky. Both of these doctors are board certified orthopedic surgeons. They examined the Plaintiff and they found--each of them found nothing wrong with her neck and back. They took her through a normal range of motion and it was normal in the neck and normal in the back. Each of these doctors told you that they could find no objective sign of injury. They said, in their opinion you need to find something objective to have a permanent injury. They said they did not make that up. You need that criteria. That is what the AMA Guide tells you, that you need to find an objective sign to determine a permanent injury or permanent impairment, right out of the AMA from doctors. They are not defense lawyers that look like myself, who want to win cases. That is the American Medical Association, the largest medical organization in the world."
(T.432-433). (Emphasis added)

The jury found no permanent injury and returned a verdict for $3,405.30 which encompassed the PIP deductible and unpaid medical bills due to the "PIP carrier" having cut off benefits following Dr. Turbins' medical exam done for them.

SUMMARY OF ARGUMENT

The Third District Court of Appeal was correct in determining that the Plaintiff was entitled to the total of her unpaid medical bills. The Petitioner herein would seek to hold the Respondent to be a self insurer requiring an innocent victim to pay the deductible on their insurance policy and unreimbursed medical associated with their treatment. Petitioner would further cast on Respondent the cost and uncertainty of litigation in requiring a Plaintiff to sue their own insurer where benefits are cut off or else become a self insurer for same. In Klugar v. White, 281 So.2d (Fla. 1973) this Court held "that where a right of access to the Courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida or where such right has become a part of the common law of the state pursuant to Fla. Stat. 2-01 the Legislature is without power to abolish such right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be

shown" at P4. In enacting into law the personal injury protection system as enumerated in various cases the intent of those laws was to offer a form of protection to a person regardless of fault but the statutes were never intended nor could they be intended to make individuals self insurers to afford exoneration to culpable parties. Kwechin v. Industrial Fire and Cas. Co., 409 So.2d 28, 30 (Fla 3 DCA 1 981), approved 447 So.2d 1337 (Fla. 1983); Fortune Insurance Co. v. McGhee, 571 So.2d 546 (Fla. 2 DCA 1990).

The aforesaid position is espoused in the En Banc decision of the Third District Court of Appeal and respectfully submitted to be the right, fair and correct position. There is no statutory mandate that would allow a culpable party and her insurance carrier to escape liability for, as in this case, their admitted negligent actions.

Additionally as noted by this Honorable Court in Purdy v. Gulf Breeze Ent, Inc., 403 So.2d 1325, 1329 (Fla. 1981) "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."

In Blue Cross & Blue Shield of Fla. v. Matthews, 498 So.2d 421 (Fla. 1986) this Court preserved the right of an insurance carrier to recover benefits paid in the face of statutes setting off collateral sources received by a Plaintiff. Respondent-Cross Petitioner submits that the basic philosophy of that case was that an innocent party forced to pay money due to someone

else's fault should be made whole. Respondent-Cross Petitioner respectfully submits that the same rule should be applied to her.

B

JURY INSTRUCTION

The Third District Court of Appeal in affirming the trial Courts decision to disallow the giving of a specific charge to the jury to wit "the words permanent injury as used in the Florida No Fault Law, include permanent subjective complaints of pain resulting from an initial organic injury", was respectfully in error.

In Johnson v. Phillips, 345 So.2d 116 (Fla. 2 DCA 1977) the Appellate Court recognized and ingrained in law the proposition that a permanent injury could be predicated on subjective complaints of pain. This law has not been modified in any way by the Legislature since 1977.

In Patterson v. Wellcraft, 509 So.2d 1195 (Fla. 1 DCA 1987) and in Florida Sheriffs Youth Fund v. Harrell, 438 So.2d 450 (Fla. 1 DCA 1983) both cases arising out of the Workers Compensation Courts the Appellate tribunals noted that the AMA Guidelines do not cover "soft tissue" injuries. Recognizing the basic unfairness of determining the importance of the outcome of the case on a guide that does not consider the type injury in question both Courts allowed evidence outside the guide in evidence and found for the Plaintiffs.

In the statement of the case and facts Respondent-Cross-

Petitioner set forth verbatim the remarks of the Defense counsel in closing. Respectfully, those remarks raise the "AMA Guide" to biblical proportions. Not only is the Plaintiff faced with overcoming the argument of the Defense doctors that there are no "objective signs of injury" but the Plaintiff must overcome the argument of the Defense predicated upon their witnesses as to the August nature of the American Medical Association which the Defense used to buttress their position.

The law in Florida is clear that each side is entitled to Jury Instructions that support their theory of the case. L.K. v. Water's Edge Assoc., 532 So.2d 1097 (Fla. 3 DCA 1988); Sears, Roebuck and Co. v. McKenzie, 502 So.2d 201 (Fla. 3rd DCA 1989). In Jones v. Smith, 547 So.2d 201 (Fla. 3 DCA 1989) the Appellate Court recognized in a similar situation medically that the jury was not cognizant that the legal definition of "permanent injury" included subjective complaints. At P. 202. Thus that case was reversed where no instruction indicating that such could be a basis was given though requested.

In receding from their position in Jones, Supra the Third District Court of Appeal in the case, Sub Judice, opined that the giving of the requested instruction, the same instruction as in Jones, Supra, "incorrectly informs the jury that under the statute permanent pain is always permanent injury" (P.3 of opinion). Respectfully the instruction does not say that nor infer such. The instruction only informs the jury that if they believe that a claimant has permanent pain then they may consider

that as a basis for determining that a permanent injury is present. The instruction tells the jury that there need not be objective signs of injury in order to find for the Plaintiff, not that they must find for the Plaintiff. The instruction provides an alternative basis to the "AMA Guide" argument and defense position that only where there are objective signs of injury can there be a permanent injury. In fact, in not allowing the jury to consider the issue with such an instruction given the court is directing a verdict, De Facto, on the issue of permanency in favor of the defense because the jury only hears that pursuant to AMA Guidelines there must be objective findings to determine a permanent injury. Thus the very fear expressed by the Third District does take place in favor of the defense position.

Based on the reasons set forth herein it is respectfully requested that this Honorable Court reverse the decision on the failure to give the requested instruction on permanent pain and upholding the decision allowing the Plaintiff to recover for the total of her unpaid medical bills.

ISSUES

I

PETITIONERS ISSUE

Whether or not a Plaintiff has a right to bring an action for the amount of actual unpaid medical bills in a case subject to the "Florida No Fault Law".

II

RESPONDENT - CROSS PETITIONERS ISSUE

Whether or not a Plaintiff is entitled to a jury instruction in a case subject to the Florida "No Fault Law" that "The Words 'permanent injury' as used in the Florida No Fault Law, include permanent subjective complaints of pain resulting from an initial organic injury"

POINT I

RESPONDENT-CROSS PETITIONERS REPLY TO PETITIONERS' BRIEF ON THE MERITS

ARGUMENT

This case involves a decision by this Honorable Court as to whether or not the Third District Court of Appeal, En Banc, was correct in holding that an injured person may collect the actual amount of unpaid medical bills connected to their treatment for injuries sustained in an automobile accident from the tortfeasor and their insurance carrier.

In Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974) this Honorable Court upheld the entire "No Fault Insurance Law", F.S. 627. 30-41 in the face of the challenge to its constitutionality. Thereafter in Industrial Fire and Casualty Insurance Company vs. Kwechin, 447 So.2d 1337 (Fla. 1983) this Honorable Court had cause to address the question of "deductibles" in light of the language of F.S. 622.739 and as to the intent of the "No Fault Law" as pertinent thereto. Initially this Honorable Court stated:

Further support for this reading of section 627.739 comes from reading it in Pari Materia with the rest of Florida's No Fault Insurance Law to allow one who lacks any other applicable

insurance coverage to purchase personal injury protection subject to a deductible of several thousand dollars makes that person, in effect, a self insurer for that not inconsiderable amount without subjecting the insured to any showing of financial responsibility as required by section 627.333(C) (b) indisputably, allowing insurance companies to issue policies with large deductibles not covered by other insurance circumvents the general policy of this law as articulated in Lasky (at P. 1339).

This Court then opined:

To read this statute to permit issuance of inappropriate coverage while it denies access to the Courts to remedy the loss raises grave constitutional problems. See Lasky, Supra; Kluger v. White 281 So.2d, (Fla. 1973) when two constructions of a statute are possible, one of which is of questionable constitutionality the statute must be construed so as to avoid any violation of the constitution. State v. Beasley, 317 So.2d 750 (Fla. 1975). Garcia v. Allstate Insurance Co., 327 So.2d 784 (Fla. 3 DCA 1976) at P 1339 (Emphasis added).

This Honorable Court then found that coverage existed such that the medical bills would, in fact be paid.

In Fortune Insurance Company vs. McGhee, 571 So.2d 546 (Fla. 2 DCA 1990) the Appellate Court in footnote 2, to the decision indicated that "we have not overlooked the fact that Section 627.737 has been amended after the Kwechim Decision. We, however, believe that the amendment to the statute has not altered the Legislative purposes of the statute" at P 548.

This purpose as set out above is clear. The intent in passage of the "No Fault Law" in part was to insure that the medical bills incurred in an auto accident were paid. Further in enacting those laws the intent was to bar double recovery but to insure that all medical bills were paid.

Counsel respectfully suggests that an individual should be treated no differently than an Insurance Company. If anything in these hard economic times where daily the newspapers report the

high cost of medical care and the need for medical reform an individual should not be made a second class citizen subject to economic deprivation that an insurance company does not suffer. In Blue Cross and Blue Shield of Florida, Inc. v. Matthews, 498 So.2d 421 (Fla. 1986) this Honorable Court had before it a case where the insurer for the Plaintiff sought to intervene to recover for medical bills it had paid out on behalf of the Plaintiff as a result of an automobile accident. The trial Court therein denied intervention on the basis that F.S. 627.7372 (Collateral source statute) barred the Plaintiff from recovering and that this therefore barred the insurance carrier from exercising their subrogation rights. This Honorable Court reversed the decision and held that the statute did not bar the subrogation rights of the carrier (At P. 422). Subrogation, by definition, places the carrier in the same position and holding the same rights as the Plaintiff.

This Honorable Court initially opined in its reasoning:

> The direct purpose and effect of the statute is to prevent double recovery by Plaintiffs of collateral source payments in personal injury suits arising from motor vehicle accidents. Under its terms the plaintiff continues to claim full damages but the jury is instructed to subtract any collateral source payments from its damages verdict. There is no question that the statute is applicable to Tysen and bars double recovery at P.422 (Emphasis added).

In holding that the insurer could recover from the tortfeasor and his insurance carrier this Honorable Court reaffirmed their holding in Purdy v. Gulfbreeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981), to wit; that Plaintiffs could waive their rights to receive collateral source benefits from

insurers and sue the tortfeasor for the full amount of their damages. At P.422.

This Honorable Court then opined in Blue Cross and Blue Shields, Supra:

As we read 627.7372, it does not bar a cause of action by either the Plaintiff insured or his insurer, it merely limits the Plaintiffs' recovery to monies to which he is equitably entitled. We see no reason in law or equity why a health insurer should not be entitled to a single recovery of costs caused by the tortfeasor. At P. 423. (Emphasis added).

Counsel respectfully submits that the idea that the at fault party should be responsible for medical bills has been made clear by this Honorable Court.

When a Plaintiff sues for unpaid medical bills the Plaintiff is in fact in the same position as an insurer seeking to recover costs for medical bills paid, if not a stronger position. In effect and in actuality the Plaintiff seeking the payment of medical bills is a Quasi insurer standing in the shoes of the health care providers. There is no rational basis for the creation of a different class of individuals whose position is different because they are individuals from that of a health care insurer.

The Defendant-Petitioner in this case claims a right to the protection of the Florida "No Fault Law", therefore it is an accepted fact that said party is in compliance with the law and although not a party to the suit the real Defendant is the insurance carrier for the Petitioner. That Defendant in issuing a policy of insurance does so incorporately the laws of Florida into their contract. Southern Crane Rental, Inc. vs.

Gainesville, 429 So.2d 612 (Fla. 1 DCA 1983); Lumbermens Mutual Cas. Co. v. Ceballos, 440 So.2d 771 (Fla. 1 DCA 1983); 11 Fla. Jur. 2 D, Sec 129.

In Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981) this Honorable Court stated:

[2] From this analysis we conclude that Sections 627.736 (3) and 627.7372 Florida Statutes (1977) do not deprive persons injured in automobile accidents of their right to access to the courts. These sections merely prevent injured plaintiffs from recovering monies which equitably speaking belong to their insurers. Furthermore, there is nothing in the law which prevents injured persons from waiving their right to receive insurance benefits and suing the tortfeasor for the full amount of their damages. Section 627.7372 sets off only those benefits which actually have been paid. Section 627.736(3) sets off benefits which are paid or payable which we interpret to include only those benefits a person is entitled to under his or her contract after he or she files a claim. Thus the right of access to the courts is left completely unimpaired. At P.1329 (Emphasis added).

A person therefore does have a right to carry a deductible waiving coverage retaining the right to collect same against a tortfeasor. Further the Purdy case, seems to accept as a premise that if insurance is carried and a claim is made for benefits under that policy the claim will be paid. That is not the case in many instances. The insurance carriers refer the injured claimants to "their doctors" who in many instances find no further need for medical care and benefits are cut off. The Plaintiffs many of who still need care, are left with the options to pay for that care and then suing the "PIP" insurance company and the tortfeasor in separate actions to recover their medical bills according to the defense theory herein. There is nothing in the law requiring that a "PIP" carrier be the only party sued nor does the law favor multiplicity of litigation requiring

separate lawsuits. There is no basis in law or equity nor should justice require that a guilty party be shielded while the Plaintiff be compelled to expend money, time and effort in a separate suit for the recovery of medical expenses. Herein the Plaintiffs' medical expenses are a combination of a $2,000.00 deductible and health care received after a "cut off" following Dr Turbins' examination. Dr. Turbins testimony is set forth in the Statement of Facts.

In McKee v. City of Jacksonville, 395 So.2d 222 (Fla. 1 DCA 1981) ruling on the constitutionality of F.S. 627.7372 commonly referred to as the "collateral source rule" the Court upheld the validity of the statute and in doing so indicated that the statute bars recovery only to the extent that collateral source benefits are received which prevents dual recovery.

While not specifically the holding of the Court, this Honorable Court in Chapman v. Dillon, 415 So.2d 12 (Fla. 1982) in discussing the "No Fault Law" and why it was constitutional noted "under the new provisions 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. At P.18 The idea being that the Plaintiffs' expenses for medical care do get covered, in total. As far as deductible and the allowance for same this court noted," the purpose of raising the permissible amount of deductible is to prevent car owners who have some other type of insurance from paying premiums for duplicate coverage. At P.18

In Erie Insurance Company v. Bushy, 394 So.2d 228 (Fla. 5

DCA 1981) and in Stephens v. Ranard, 487 So.2d 1077 (Fla. 5 DCA 1986) both Appellate Courts rejected arguments similar to the one made by Petitioner herein that would make the injured Plaintiff a self insurer for unpaid medical bills. As stated by the Appellate Court in Stephens, Supra:

> The second point is governed by Erie v. Bushy, 394 So.2d 228 (Fla. 5 DCA 1981) which held it is error to reduce a plaintiffs damage award for her failure to obtain the statutory required personal injury protection. At P.1080

Similarly in Ward v. Nationwide Mutual Fire Insurance Company, 364 So.2d 73 (Fla. 3 DCA 1978) The insurance carrier argued that F.S. 627.733 (F.S. 1977) made the owner of an automobile a self insurer in the absence of required "PIP" benefits. The statute stated.

> An owner of a motor vehicle with respect to which security is required by this section who fails to have such security in effect at the time of the accident --- shall be personally liable for the payment of PIP benefits under section 627.736. With respect to such benefits, such an owner shall have all the rights and obligations of an insurer under section 627.736. With respect to such benefits, such as owner shall have all the rights and obligations of an insurer under section 627.730 - 627.741.

Then Appellate Court therein noted "We are urged to interpret the statute as making the owner of an uninsured motor vehicle a self insurer of PIP benefits to himself." At P.77. The Court rejected such position. At P.77.

As noted by the En Banc decision of the Appellate Court herein, there has been no mandate issued "That a tortfeasor's obligation to pay damages be reduced by the victims deductible". In fact as the decision correctly sets forth the overriding purpose of the statute is to assure complete insurance coverage

for the injuries. C.F. Kwechim, Supra, also see International Bankers Ins. v. Arnone, 552 So.2d 908 (Fla. 1989).

The same cases offered to this Honorable Court by Petitioner were offered to the Third District Court of Appeal, En Banc, to which the Court noted Appellees have not provided any authority to support their unorthodox proposition; we therefore decline their invitation to so construe the statute".

Of all the cases cited by Petitioner an examination of the issues presented reveals that only one touches upon the true issue in the case at bar. The decision in Heidenstrauch v. Bankers Ins. Co., 564 So.2d 581 (Fla. 4 DCA 1990) seems to favor the position Petitioner espouses. However that case is premised on the holding of Verdecia v. American Risk Assurance Co., 543 So.2d 321 (Fla. 3 DCA 1989). It can be more than assumed that in rendering the decision in the case at bar, the Third District Court of Appeal, En Banc, was cognizant of the Verdacia, Supra, decision since it emanated from their Court and found it no bar to the ruling entered herein.

What Petitioners requests this Honorable Court to do is to punish a person who is injured in an accident and who has a deductible to their PIP insurance by making them a self insurer for those bills and for the medical care received after the PIP carrier has determined to cut the benefits off. If a person does not have any PIP insurance as noted in Erie, Supra, and Stephens, Supra, in violation of Florida law it is acceptable and allowable to sue the at fault party for medical bills. Yet,

Petitioners would allow and so suggests a bar to exist where a person complies with the law by having a policy which contains a deductible. Thus, a person who has not obeyed the law is in a better position, than a person who has complied with the law.

The PIP statutes as interpreted by the decisions of the Appellate Courts of this state and this Honorable Court have, as set forth above, been intended to cover the bulk of most medical bills allowing the injured party to sue to claim the unpaid bills. No court case has ever further imposed a self insurance obligation on an injured person such that their right to be made whole is destroyed. Any such interpretation as Petitioners suggest is so violative of the law pronounced in Kluger v. White, 281 So.2d 1 (Fla. 1973) as to be repugnant.

When in fact a Plaintiff sues for unpaid medical bills what they are doing is suing for the health care providers. This is not money that goes to the Plaintiff. The money recovered by the Plaintiff is for the use and benefit of the health care providers. There is no question that a health care provider suing as subrogee has the right in this type case to recover their expenses. Blue Cross and Blue Shield v. Matthews Truck, 498 So.2d 421 (Fla. 1986).

Do we need to consult fiction and determine that in this case because a Plaintiff is suing to see that the cost of health care is paid that a special class of person needs to be created so that a Defendant should escape the damage that they caused? It is respectfully submitted that such should not be allowed and

that no case stands for the proposition that it should.

The state of Florida does not need an exhaulted class, the insurance carriers, and a secondary class of people, the citizens. The idea of shielding at fault parties while leaving innocent injured parties to be self insurers is obnoxious to every concept of justice. When the "No Fault Law" was enacted and attacked on various grounds as unconstitutional this Court, as set out above continually indicated that between insurance payments and the right to recover medical bills and lost wages not covered no constitutional impairment existed in the enactment and enforcement of the law. To accept the Petitioners position is to engraf into law an unconstitutional application of the "No Fault Law". Adoption of Petitioners position would allow the taking away of a right, a right not taken away from health care carriers, with no reasonable alternative given and no right of recourse to a Court to seek redress.

Wherefore the decision on this point should be affirmed.

RESPONDENT - CROSS PETITIONERS
ARGUMENTS ON THE MERITS

The Third District Court of Appeal in the case, Sub Judice, in receding from their opinion in Jones v. Smith, 547 So.2d 201 (Fla. 3 DCA 1989) is respectfully in error and the law of Florida should be that expressed on the same point in Johnson v. Phillips, Supra. At issue before this Honorable Court is whether a Plaintiff who has suffered injuries such as a concussion or injuries to muscles and ligaments where years after the accident there will be no objective evidence of such on a

daily basis is entitled to have a jury fairly consider by instruction whether a claim based on an initial organic injury later manifesting itself in the form of pain meets the requirements of the Florida "No Fault Law".

F.S. 627.737 requires that for a claimant to recover "pain and suffering" damages there must be established a permanent injury within a reasonable degree of medical probability. There is no requirement for any guide to be used or any standard to be utilized in determining a permanent injury other than within reasonable medical probability. Had the Legislature intended to delete the many conditions that can occur following trauma and assuming such was constitutional than perhaps the decision of the Third District would be correct. However, if a Plaintiff does have a right to present a case whereafter an initial organic injury there remains only sporadic or non existent signs of objective injury and permanent complaints of subjective pain than in such cases the Plaintiff should be given a fair and equal opportunity to have such claim considered by a jury.

In the case at bar the Plaintiff suffered what are commonly referred to as "soft tissue" injuries. These injuries after the acute phase may on some occasion manifest objective signs of injury such as spasm but for the most part there will be no objective signs of injury on a daily basis. The doctors treating the Plaintiff testified that based on her subjective complaints of pain and her subjective symptomatology she had in fact been permanently injured.

As is the case regularly, in the experience of the undersigned the defense doctors testified that when they examined the Plaintiff, which coincidentally is years after the incident there were no objective signs of injury and pursuant to the American Medical Association Guide, hereinafter referred to as the AMA Guide, Plaintiff had suffered no permanent injury. (T157, 158, 170, 120, 206, 207 - see videotape of Dr. Wilensky) The Defense attorney did nothing the law does not allow him to do and what he did was done well. After securing testimony from his three doctors he argued that based on the AMA Guide the Plaintiff, with no objective sign of injury had suffered no permanent impairment. He also, brought to the attention of the jury the alleged importance of the AMA Guide. He secured from Dr. Turbin that the AMA Guide is a recognized authority in the medical community (T157). In fact Dr. Turbin opined that <u>the guide</u> must be used as it is the <u>only way</u> to determine permanency. This opinion was supported and buttressed by the same type questions and answers to Dr. Castiello (T207) and Dr. Wilensky (see videotape deposition).

In driving the nail into the coffin the defense attorney made sure in closing argument that the jury would understand that only where there is an objective sign of injury such that it could be rated pursuant to the AMA Guide could the jury find for the Plaintiff. His closing argument on this point was.

Now, what else did we hear? You heard from both Dr.Turbin and Dr. Wilensky. Both of these doctors are Board Certified Orthopedic Surgeons. They examined the Plaintiff and they found - each of them found nothing wrong with her neck and back. They

took her through a normal range of motion and it was normal in the neck and normal in the back. Each of these doctors told you that they could find no objective sign of injury. They said, in their opinion you need to find something objective to have a permanent injury. They said they did not make that up. You need that criteria. That is what the AMA Guide tells you, that you need to find an objective sign to determine a permanent injury or permanent impairment, right out of the AMA from doctors. They are not defense lawyers that look like myself, who want to win cases. That is the American Medical Association, the largest medical organization in the world. (T432-433) Emphasis added.

To what may the Plaintiff point in argument in opposition? What in effect occurs is a De Facto directed verdict for the defense. The jury is told only if there is an objective sign of injury can the Plaintiff recover. This is so because the AMA says it is so. Where is the basic fairness of a courtroom when in truth there is no statutory requirement obligating the jury to only consider the AMA Guide as the standard upon which they are to base their determination nor would such a standard be fair in light of the multiple conditions known in medicine as not being able to be detected "objectively".

Faced with the same question, i.e. whether the AMA Guides should control the determination of whether a person has suffered a permanent injury the trial Judges and Appellate Courts have consistently rejected such in the area of workers compensation law.

In Patterson v. Wellcraft Marine, 509 So.2d 1195 (Fla. 1st DCA 1987), the Appellate Court in commenting on the use of AMA Guides relative to soft tissue injuries stated the following:

"Additionally, and perhaps most importantly, Dr. Kauffman's determination that claimant had suffered no permanent impairment was based exclusively upon the AMA Guides, which have no application to the type of injury suffered by claimant: lumbar

back strain. In Florida Sheriffs Youth Fund v. Harrell, 438 So.2d 450 (Fla. 1st DCA 1983), this court observed that soft tissue injury is not covered by the Guides because they do not measure impairment to the back or pelvis in the absence of limitation of motion. Quoting with approval from the attending physician's testimony, we observed that as to soft tissue injuries, the Guides do not truly address such injuries, because they refer either to disk lesions or fractures. The AMA Guides' failure to take into consideration the type of soft tissue injury described by Dr. Meriwether was also discussed by this court in Martin County School Board v. McDaniel, 465 So.2d 1235 (Fla. 1st DCA) (on rehearing En Banc), appeal and cross-appeal dismissed, 478 So.2d 54 (Fla. 1985), in which we observed the basic similarities between the facts in Harrell and those in McDaniel, wherein both patients suffered soft tissue injuries, and medication was prescribed for the specific purpose of preventing acute muscle spasms" (at P119).

The Court concluded, therefore, as follows:

"(3) Under circumstances where prescribed medical rating guides do not adequately address an impairment, we have recognized that the deputy can properly rely upon a physician's qualified expert opinion, which utilizes experience in treating a claimant, and that such an opinion will suffice without reliance on a medical manual or guide. United General Construction v. Cason, 479 So.2d 833, 834 (Fla. 1st DCA 1985); Martin County School Board v. McDaniel. At P119)

The philosophy of the Court in Patterson, supra, is clear. First of all, the Guides are not controlling, and secondly, it would not be fair or just to base a result on a "guide," particularly when the guide does not include the problem, thus excluding it from fair consideration.

Thus, by clear implication, in the case, sub judice, the jury is told by the defense doctors that unless there is an objective sign of injury, there can be no permanent injury. This opinion is sanctified by the weight of the AMA Guide so that a jury unsophisticated in these matters is put in a position where they truly do not have a basis for finding a permanent injury. The only real hope that a Plaintiff has for cases where

subjective complaints are the ultimate basis for a permanent injury complaint is for the Court to instruct the jury as set forth in Jones v. Smith, Supra and Johnson v. Phillips, Supra.

In Fuster v. Eastern Airlines, Inc., 545 So.2d 268 (Fla. 1st DCA 1988), discussing the determination of whether an injury is permanent and whether the AMA Guide should be controlling where soft tissue injures are at issue, the Court stated, referring to previous holdings:

> "That when permanent impairment cannot reasonably be determined under the AMA Guidelines, it may be established under other generally accepted medical criteria for determining impairment." At Page 271-272.

While the Fuster case dealt with a Worker's Compensation case, is there any logical reason to treat people injured in auto accidents any differently? If there is a recognition, which clearly there is at the appellate level, that reliance on the AMA Guides to opine that no disability exists is not only unfair, but only allow "one side" of the issue to be presented in Worker's Compensation cases, then what is the justification to penalize the injured person injured by the negligence of another in an automobile accident? The jury must have a reasonable option to the AMA Guides for they are far less skilled than a deputy commissioner.

This can only be accomplished by allowing the jury to know that the law encompasses alternative considerations for them to decide from as to whether in a particular case a person has sustained a permanent injury. Without such instruction the jury is led to believe that their decision must be predicated only on

one standard, that set forth in the AMA Guide.

In Johnson v. Phillips, 345 So.2d 1116 (Fla. 2 DCA 1977) the Plaintiff presented a claim predicated on the effects of a concussion. The medical testimony was that the doctor did not feel that the patient had permanent organic injury but that the subjective complaints of pain would be permanent.

In determining the issue therein the appellate court stated they interpreted the word "permanent injury" to include subjective complaints of pain resulting from an organic injury (At P1117). No legislative enactment has ever become law to change that definition. Surely if the Legislature Felt such was appropriate it can be assumed such would have occurred in the lengthy period of years since that case was decided.

In their initial treatment of this issue in Jones v. Smith, Supra, it is respectfully submitted that in ruling in accordance with Johnson, Supra, the Third District Court of Appeal clearly understood the problem a Plaintiff had in carrying the burden of proof in a soft tissue injury case when years after the accident only subjective complaints remain. In ordering a new trial the Court in Jones, Supra noted that the jurors were misled by the failure to give the instruction at issue in that the jurors were not fully cognizant that the legal definition of "permanent injury" included subjective complaints.

This point and the specific language of the court in Jones, Supra is very meaningful. The idea that the definition of "permanent injury" includes subjective complaints of pain

recognized that this is one of the possibilities. This does not mean that if a person has subjective complaints of pain there is only one possible finding.

There is no instruction, nor does the one at issue instruct the jury that they must find for the Plaintiff. If the jury determines to believe the Plaintiff that in fact Plaintiff is suffering from a permanent condition of pain the instruction at issue only tells them that such does meet the standard for determining that a permanent injury exists. The instruction does not take away their ability to find no permanent injury based on, as in this case a sprain, if they choose to believe the defense doctor that to find a permanent injury there must be objective evidence (T170) in accordance with the AMA Guide (T158) and in cases of a sprain there is never a permanent injury (T172).

The allowance of the subject instruction gives both sides an equal opportunity to present their positions to the jury. It allows the jury to know that more than one standard exists for determining permanent injury. The subject instruction does not mandate to a jury which standard to accept nor does it require that the jury find the Plaintiff credible such that the jury believes that a Plaintiff is in fact suffering pain on a permanent basis. The allowance of the instruction only lets the jury have both sides of the issue in order to fairly evaluate the issue and render an informed and educated verdict.

WHEREFORE Respondent-Cross Petitioner request this Honorable

Court to reverse the decisions of the Trial Court and Third District Court of Appeal on this issue and order a new trial.

CONCLUSION

Based upon the authorities and reasons set forth above, it is respectfully submitted that with regard to the issue presented by Petitioner there is no express and direct conflict and that the decision of the Third District Court of Appeal should be affirmed.

Further, based on the authorities and reasons set forth above, it is respectfully submitted that an express and direct conflict does exist on Respondent-Cross Petitioners' issue and that this Honorable Court should rule that Respondent-Cross Petitioner was entitled to the requested instruction and order a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Jeanne Heyward, 300 Roberts Building, 28 West Flagler Street, Miami, Florida 33130 and to Seven R. Simon, Esq., Rosner & Simon, P.A., 21 S.E. First Avenue, 10th Floor, Miami, Florida 33131 on this the 2nd day of April, 1992.

GARY E. GARBIS, ESQ.

A P P E N D I X

I N D E X

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 permanent pain constituted a 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." Section 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

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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.

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. vs. 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. vs. Matthews, 498 So.2d 421, 422 (Fla. 1986). The record established 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).