IN THE SUPREME COURT

OF FLORIDA

CASE NO. 78,856

MICHAEL MANSFIELD and MARY GROSS MANSFIELD

Petitioners,

vs.

ROSA RIVERO and FREDERICO RIVERO

Respondents.

DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Case Nos. 89-1941; 89-1851

PETITIONERS' JURISDICTIONAL BRIEF AND APPENDIX

STEVEN R. SIMON, ESQ.
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TOPICAL INDEX

CITATION OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Petitioners/Appellees/Defendants[1], MICHAEL MANSFIELD and MARY GROSS MANSFIELD [MANSFIELD], seek review of 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).

ROSA RIVERO and FREDERICO RIVERO, her husband, sued MARY and MICHAEL MANSFIELD for damages for injuries sustained by ROSA RIVERO as a result of an automobile accident. After the MANSFIELDS admitted liability, the trial proceeded on the issue of damages and whether the RIVEROS crossed the permanent injury threshold requirement of §627.737(2) Fla.Stat. (1983). Based upon conflicting evidence the jury found that ROSA RIVERO had not sustained a permanent injury and returned a verdict in the RIVEROS' favor, awarding them the uncontested amount of ROSA'S unpaid medical bills. 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 §627.737 Fla.Stat. (1983). The trial court

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[1]The parties will be referred to as they stand before this Honorable Court and the symbol "A" signifies Petitioners' Appendix.

granted the motion and entered an Amended Final Judgment for the reduced amount.

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, 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 he is allowed to recover 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, holds that even where a party does not meet the threshold requirement he is allowed to recover his PIP deductible from the exempt tortfeasor. The conflict is obvious.

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 not only has the constitutionality of the personal injury protection coverage (PIP) been

upheld in Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974) and Chapman v. Dillon, 415 So.2d 12 (Fla. 1982) but the propriety of the deductible amounts authorized under §627.739 have also been upheld 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[2].

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[2]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.

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 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 accept jurisdiction.

Respectfully submitted,

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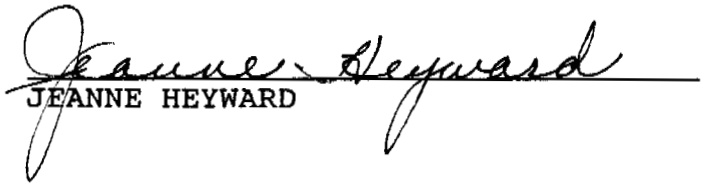

JEANNE HEYWARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 31st day of October, 1991 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

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).

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NOS. 89-1941
89-1851

ROSA RIVERO and
FREDERICO RIVERO,

Appellants,

vs.

MICHAEL MANSFIELD and
MARY GROSS MANSFIELD,

Appellees,

MOTION FOR REHEARING,
MOTION FOR REHEARING EN BANC
AND
MOTION TO CERTIFY

COME NOW the Appellees, MICHAEL MANSFIELD and MARY GROSS MANSFIELD, by and through their undersigned counsel, and respectfully file this Motion For Rehearing, Motion For Rehearing En Banc And Motion To Certify from the decision of this Honorable Court dated April 23, 1991 and as grounds for each motion respectfully state as follows:

1. The decision states that §627.739(1), Fla.Stat. (1983) does not contain a mandate that a tortfeasor's obligation to pay damages shall be reduced by the amount of the victim's deductible. The decision states that Appellees' argument is an "unorthodox proposition" and therefore the Court declines the invitation to so construe the statute. Appellees respectfully state that this overlooks the following and is in conflict therewith:

2. §627.739(1) provides as follows:

> **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 dependent 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 coverages 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 xx. 627.730-627.7405.

3. In Johnson v. Prudential Property Cas. Ins. Co., 365 So.2d 441 (Fla. 3d DCA 1978) this Court held that where a tortfeasor's insurer paid the father its liability limits of $15,000.00, §627.739 precluded recovery by the father on behalf of his injured infant daughter for the $2,000.00 deductible portion of the personal injury protection benefits. A copy of the decision is attached.

4. In Verdecia v. American Risk Assur. Co., 543 So.2d 321 (Fla. 3d DCA 1989) cert. den., 551 So.2d 464 (Fla. 1989) appellant alleged that Section 627.739 (1) Fla. Stat. (1983) was unconstitutional because it allegedly denied the insured his right of access to the courts by barring any tort remedy against the tortfeasor for a PIP deductible without providing a reasonable alternative. This Court in rejecting this argument said inter alia:

> Second, the statutory provision eliminating the tort remedy against the tortfeasor for the PIP deductible is constitutional in any event. This is so because a reasonable alternative is provided therefor by the entire automobile no-fault scheme, namely, prompt payment for a reasonable portion of the damages sustained by the injured party. The PIP deductibles have a ceiling of $2,000; 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. Chapman v. Dillon 415 So.2d 12 (Fla. 1982); Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974); Kluger v. White.

(A copy of the decision is also attached.)

WHEREFORE, Appellees, MICHAEL MANSFIELD and MARY GROSS MANSFIELD, respectfully request this Honorable Court to grant this Motion For Rehearing and to vacate the part of the decision which held that §627.739(1), Fla. Stat. (1983) does not require subtraction of the amount of the RIVEROS' deductible from the jury award.

In the alternative, Appellees move for an En Banc Rehearing on the sole issue of subtraction of the amount of the deductible from the jury award. In conjunction with this Motion For Rehearing En Banc and pursuant to F.A.R. 9.331(2) counsel for Appellees state:

I express a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the following decisions of this Honorable Court and that a consideration by the full Court is necessary in order to maintain uniformity of decisions in this Court:

Johnson v. Prudential Property & Cas. Ins. Co.,
365 So.2d 441 (Fla. 3d DCA 1978).

Verdecia v. American Risk Assur. Co.,
543 So.2d 321 (Fla. 3d DCA 1989) cert. den., 551 So.2d 464 (Fla. 1989).

In the alternative, Appellees request this Honorable Court to certify the following question to the Supreme Court on the ground of exceptional importance i.e., whether §627.739(1) requires reduction of any jury award by the amount of the deductible.

Respectfully submitted,

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Jeanne Heyward

JEANNE HEYWARD
(Fla. Bar #035812)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 7th day of May, 1991, to: GARY E. GARBIS, P.A., 701 S.W. 27th Avenue, Suite 1000, Miami, Florida 33135.

Jeanne Heyward

JEANNE HEYWARD

ceeds of the sale by not properly depositing them in appellant's account, but he did not create a "loss" of the vehicle as that term is defined in the insurance policy. Accordingly, the trial court acted correctly in granting appellee's motion for a directed verdict and in entering final judgment in favor of appellee.

Affirmed.

Gary E. BENTZEL, Appellant,

v.

The STATE of Florida, Appellee.

No. 78-841.

District Court of Appeal of Florida, Third District.

Dec. 19, 1978.

The Circuit Court, Monroe County, Bill G. Chappell, J., denied petition for habeas corpus and ordered petitioner's extradition to Pennsylvania, and petitioner appealed. The District Court of Appeal, Schwartz, J., held that Governor's rendition warrant was indispensable, and thus failure to introduce it was fatal to State's case.

Reversed and remanded.

Extradition and Detainers ⇐36

Governor's rendition warrant which formed basis of extradition proceeding was indispensable, and thus failure to introduce warrant was fatal to State's case.

Alvin E. Entin, Miami, Manuel James, Key West, for appellant.

Robert L. Shevin, Atty. Gen. and Jeffrey Samek, Asst. Atty. Gen., for appellee.

Before HUBBART, KEHOE and SCHWARTZ, JJ.

SCHWARTZ, Judge.

The defendant appeals from a judgment which denied his petition for habeas corpus and ordered his extradition to Pennsylvania. The record shows that the Governor's rendition warrant which formed the basis of the extradition proceeding was never introduced into evidence at the hearing below. We hold, on the authority of *Di Piero v. State*, 300 So.2d 700 (Fla. 3rd DCA 1974) and *Simpson v. Woodham*, 332 So.2d 693 (Fla. 1st DCA 1976) that the warrant was indispensable, and that the failure to introduce it was fatal, to the state's case. The judgment below is therefore reversed and the cause remanded with directions to discharge the defendant.

Reversed and remanded.

Angelique JOHNSON, by and through her natural father and next friend, Lawrence Johnson, and Lawrence Johnson, Individually, Appellants,

v.

PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY, Appellee.

No. 78-1000.

District Court of Appeal of Florida, Third District.

Dec. 19, 1978.

Infant pedestrian and her father brought suit seeking to recover deductible portion of personal injury protection benefits from insurer of tort-feasor. The Circuit Court, Dade County, Francis X. Knuck, J., entered judgment in favor of insurer, and pedestrian and her father appealed. The District Court of Appeal, Pearson, J., held that statute precluded recovery by father on behalf of his daughter of $2,000 deductible portion of personal injury protection benefits.

Affirmed.

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Insurance ⇐512.1(1)

Where father of infant took out automobile insurance policy on his own automobile, where policy had $2,000 personal injury protection deductible provision, where young daughter was pedestrian when hit by automobile covered by insurer, and where tort-feasor's insurer paid father its liability limits of $15,000, statute precluded recovery by father on behalf of his daughter of $2,000 deductible portion of personal injury protection benefits. F.S.1977, § 627.739.

G. E. Petrie, Jr., Coconut Grove, Mona Frommell, Coral Gables, for appellants.

Wicker, Smith, Blomqvist, Davant, McMath, Tutan & O'Hara and Richard A. Sherman, Miami, for appellee.

Before PEARSON, HENDRY and BARKDULL, JJ.

PEARSON, Judge.

The appellants are an infant daughter, who brought suit through her natural father and next friend, and the father, individually. The father and daughter appeal a judgment of the trial court holding that the daughter (pedestrian) and her father, the plaintiffs, are not entitled to recover the deductible portion of personal injury protection benefits from the defendant insurer of a tort-feasor.

The basic facts are not in dispute. The father took out an automobile insurance policy on his own car. This policy had a $2,000 personal injury protection deductible provision. His young daughter was a pedestrian when hit by a car insured by the appellee Prudential Property & Casualty Insurance Company. Prudential paid the father its liability limits of $15,000. The father and daughter then brought this action against Prudential to recover the $2,000 personal injury protection section of the father's policy. The trial court ruled that Section 627.739,[1] Florida Statutes (1977), precluded recovery by the father on behalf of his daughter of the $2,000 deductible portion of personal injury protection benefits.

The appellants, having failed to show any reason that the statute does not apply, we find no error. The judgment of the trial court is affirmed.

Affirmed.

AMERICAN FIDELITY FIRE INSURANCE COMPANY, Appellant,

v.

ALLIED GENERAL CONTRACTORS, INC., a Florida Corporation, Appellee.

No. 78-1090.

District Court of Appeal of Florida, Third District.

Dec. 19, 1978.

Surety brought suit against general contractor for restitution, negligence, and

1. "627.739 Personal injury protection; optional limitations; deductibles, optional methods of payment for repair work.—*In order to prevent duplication with other private or governmental insurance or benefits for senior citizens and others with access to such insurance or benefits*, each insurer providing the coverage and benefits described in § 627.736(1) shall offer to the named insureds modified forms of personal injury protection as described in this section. *Such election may be made by the named insured to apply to the named insured alone, or to the named insured and dependent relatives residing in the same household. Any person electing such modified coverage, or subject to such 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 §§ 627.730–627.741. Premium reductions for each modification or combination of modifications shall be adequate to recognize the reduction in hazard and shall be subject to the approval of the Department of Insurance." [Emphasis Added]

found to be immaterial to the disposition of the case, or on issue upon which city prevailed before Commission.

2. Labor Relations ⇐574

Public Employees Relations Commission did not depart from essential requirements of law in finding that police union waived its right to bargain issue of whether uniformed police personnel could be prohibited from wearing beards by a provision in the collective bargaining agreement.

Gordon P. Rogers of Muller, Mintz, Kornreich, Caldwell, Casey, Crosland & Bramnick, P.A., Miami, for appellant/cross-appellee.

Robert D. Klausner of Klausner & Cohen, P.A., Hollywood, for appellee/cross-appellant.

PER CURIAM.

The City of Ft. Lauderdale (City) appeals an order of the Public Employees Relations Commission (PERC) which found that the City did not commit an unfair labor practice by unilaterally revising § 21 of its rules and regulations book to prohibit uniformed police personnel from wearing beards. The Fraternal Order of Police, Ft. Lauderdale, Lodge 31 (FOP) cross-appeals the same order. We dismiss the City's appeal and affirm PERC's order on cross-appeal.

[1] The City contends that PERC misinterpreted Florida's statutory management rights clause, § 447.209, Fla.Stat. The City is in effect asking this court for an advisory opinion on an issue not ruled upon by the hearing officer and found to be immaterial to the disposition of the case by PERC. The City also contends PERC properly concluded that the FOP waived any right it may have had to bargain concerning the "no beards rule" and that the unfair labor practice charge against it was properly dismissed. The City prevailed on this issue and it cannot appeal an order on an issue on which it prevailed before PERC. We therefore dismiss the City's appeal.

[2] On cross-appeal FOP contends that PERC departed from the essential requirements of law in finding that it waived bargaining by contract under Article 50, § 4 of the Collective Bargaining Agreement. There was no departure from the essential requirements of law and there is ample competent substantial evidence to support PERC's finding that FOP waived any right it may have had to bargain concerning the "no beards rule." PERC's order is therefore AFFIRMED.

WENTWORTH, THOMPSON and WIGGINTON, JJ., concur.

Marcelino VERDECIA, Appellant,

v.

AMERICAN RISK ASSURANCE COMPANY, a Florida corporation, Appellee.

No. 88-1187.

District Court of Appeal of Florida, Third District.

May 9, 1989.

Following initial appeal, 494 So.2d 294, insured appealed from adverse declaratory decree of the Circuit Court, Dade County, Maria Korvick, J., rejecting insured's claim that personal injury protection statute was unconstitutional. The District Court of Appeal held that statute did not unconstitutionally deny insured right of access to courts.

Affirmed.

1. Constitutional Law ⇐42.1(1)

Insured did not have standing to challenge constitutionality of personal injury protection statute provision barring tort remedies against tort-feasor for PIP de-

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ductible in action brought against insurer rather than tort-feasor. West's F.S.A. Const. Art. 1, § 21.

2. Automobiles ⇐251.12
Constitutional Law ⇐328

Statute eliminating tort remedy against tort-feasor for personal injury protection deductible did not unconstitutionally deny insured right of access to courts; entire automobile no-fault scheme provided reasonable alternative to tort remedy by providing for prompt payment for reasonable portion of damages sustained by injured party. West's F.S.A. Const. Art. 1, § 21.

John B. Ostrow, James C. Blecke and Susan S. Lerner, for appellant.

Anthony Reinert and William T. Goran, for appellee.

Before BARKDULL, HUBBART and COPE, JJ.

PER CURIAM.

This is an appeal by a personal injury protection [PIP] insured from an adverse declaratory decree which rejected the insured's claim that Section 627.739(1), Florida Statutes (1983), was unconstitutional because it allegedly denied the insured his right of access to the courts, Art. I, § 21, Fla. Const., by barring any tort remedy against the tortfeasor for a PIP deductible without providing a reasonable alternative. This statute provides as follows:

> "The named insured may elect a deductible to apply to the named insured alone or to the named insured and dependent 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.*"

§ 627.739(1), Fla.Stat. (1983) (emphasis added). Specifically, it is urged that the statute does not, as it should, provide that the insured have other insurance which would cover the PIP deductible amount as a precondition to obtaining PIP with a deductible. We disagree and affirm based on the following briefly stated legal analysis.

[1] First, we conclude that the insured has standing to raise this constitutional claim, but such claim can only be urged in a suit against the tortfeasor—and not, as here, in an action against the PIP insurer. This is so because if the constitutional claim is ultimately upheld, only the statutory provision eliminating the tort remedy against the tortfeasor for the PIP deductible would be struck down as a denial of the insured's right of access to the courts—and not, as urged, the statutory provisions creating the PIP deductible itself. In that event, the PIP insured's only remedy would be to collect the PIP deductible against the tortfeasor—and not, as urged, against the PIP insurer because the PIP deductible provisions in the statute would still be viable. Plainly, then, the insured's constitutional claim could only be raised in a suit against the tortfeasor in which the insured's tort remedy could be restored—and not, as here, in a suit against the PIP insurer in which there would be no entitlement to have the PIP deductible provisions of the statute declared invalid. *Compare Kluger v. White*, 281 So.2d 1 (Fla.1973).

[2] Second, the statutory provision eliminating the tort remedy against the tortfeasor for the PIP deductible is constitutional in any event. This is so because a reasonable alternative is provided therefor by the entire automobile no-fault scheme, namely, prompt payment for a reasonable portion of the damages sustained by the injured party. The PIP deductibles have a ceiling of $2,000; 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. *Chapman v. Dillon*,

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415 So.2d 12 (Fla.1982); *Lasky v. State Farm Ins. Co.*, 296 So.2d 9 (Fla.1974); *Kluger v. White.*

The final declaratory decree is therefore, in all respects,

Affirmed.

The STATE of Florida, Petitioner,

v.

Mariano ROMANEZ, Respondent.

No. 88-2954.

District Court of Appeal of Florida, Third District.

May 9, 1989.

State sought certiorari review of pre-trial order of the Circuit Court, Dade County, Ursula M. Ungaro, J., excluding from evidence at trial hearsay statements of alleged child sexual abuse victim. The District Court of Appeal held that: (1) findings supported by evidence, that child had severely disturbed mental condition which greatly affected her ability to distinguish reality from fantasy and truth from untruth, and that child's statements were vague, lacking in detail, and partially contradictory in critical respects, required exclusion of statements under statute permitting introduction in evidence of hearsay statement by child victim describing child abuse or sexual abuse, and (2) State was not denied any procedural rights by trial court's apparent partial reliance on corroborative testimony of State's witnesses at prior hearing in which trial court barred defendant from deposing child based upon child's fragile mental condition, in determining that hearsay statements of child should be excluded from evidence.

Petition denied.

Cope, J., filed dissenting opinion.

1. Infants ⇐20

Findings supported by evidence, that alleged child sexual abuse victim had severely disturbed mental condition which greatly affected her ability to distinguish reality from fantasy and truth from untruth, and that alleged victim's statements were vague, lacking in details, and partially contradictory in critical respects, required exclusion of hearsay statements of alleged victim under statute permitting introduction of hearsay statements made by child victim describing child abuse or sexual abuse. West's F.S.A. § 90.803(23)(a).

2. Infants ⇐20

State was not denied any procedural rights by trial court's apparent partial reliance on corroborative testimony of State's witnesses at prior hearing in which trial court barred defendant from deposing alleged child sexual abuse victim based on alleged victim's fragile mental condition, in determining to exclude from evidence at trial hearsay statements of alleged victim; such prior testimony was relevant to issue before trial court, and trial court was entitled to consider full record. West's F.S.A. §§ 90.803(23)(a), 90.202(6).

Robert A. Butterworth, Atty. Gen., Tallahassee, and Ralph Barreira, Asst. Atty. Gen., Miami, for petitioner.

Friend & Fleck, and Geoffrey Fleck, South Miami, for respondent.

Before BARKDULL, HUBBART and COPE, JJ.

PER CURIAM.

The State of Florida seeks certiorari review of a pre-trial circuit court order excluding from evidence at trial the hearsay statements of an alleged child sexual abuse victim. We have jurisdiction to entertain the state's petition for certiorari review, Art. V, § 4(b)(3), Fla.Const.; *State v. Pettis*, 520 So.2d 250 (Fla.1988), and deny the subject petition based on the following briefly stated legal analysis.

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1991

SEPTEMBER 27, 1991

ROSA RIVERO, et al.,	**	CASE NO. 89-01941 89-01851
Appellant(s),	**	
vs.	**	
MICHAEL MANSFIELD, et al.,	**	LOWER TRIBUNAL NO. 86-17712
Appellee(s).	**	

Upon consideration, appellees' motion for rehearing, rehearing en banc and motion to certify is hereby denied. Appellants' motion for rehearing, reconsideration and/or certification to Supreme Court is denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal ~~of~~ Third ~~Dist~~rict

By: _____
Deputy Clerk

cc: Gary Garbis
Jeanne Heyward
/NB

Steven R. Simon

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