IN THE SUPREME COURT OF FLORIDA

CASE NO.: 91-0818
FLORIDA BAR NO.: 334391

79,662

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JOSEPH DAUKSIS and JANICE DAUKSIS,

Plaintiffs/Petitioners,

-vs-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and RAMIRO BENAVIDEZ,

Defendants/Respondents.
_____/

INITIAL BRIEF OF PLAINTIFFS/PETITIONERS JOSEPH DAUKSIS AND JANICE DAUKSIS APPEAL FROM THE 4TH DISTRICT COURT OF APPEAL

Daniel E. Jacobson, Esq.
JACOBSON, COHEN & COHEN, P.A.
800 N.W. 62nd Street
Suite 200
Ft. Lauderdale, Florida 33309
(305)491-6444

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PRELIMINARY STATEMENT

The Defendant/Respondent, State Farm Mutual Automobile Insurance company, will be referred to as State Farm.

The Plaintiff/Petitioner, Joseph Dauksis, will be referred to as Mr. Dauksis, or Plaintiff/Petitioner.

The record will be cited as "R (page number[s])."

The trial testimony will be referred to by "T (page number[s].)"

Unless otherwise indicated, all emphasis is supplied by the writer.

The case of State Farm Mutual Automobile Insurance Company v. Joseph Dauksis and Janice Dauksis and Ramiro Benavidez, 17 FLW D858 (4Th DCA 1992) shall be referred to as Dauksis.

STATEMENT OF THE CASE AND FACTS

On June 10, 1988, Mr. Dauksis's car was struck from behind by an uninsured motorist (R 442). As a result of the uninsured tortfeasor, Mr. Dauksis made a claim against State Farm, his uninsured motorist carrier for the injuries which he sustained in the accident. State Farm claimed that the injuries were soft tissue, but Mr. Dauksis and his treating physicians claimed that the accident caused a herniated disc (T 44-104; 120).

At trial, the plaintiff moved in limine to preclude State Farm from arguing the issue of the permanency of Mr. Dauksis's injuries, based upon the recent case of Newton v. Auto-Owners Insurance Co., 560 So.2d 1310 (1st DCA 1990), rev. denied, 574 So.2d 139 (Fla), and rev. denied, 574 So.2d 141 (Fla 1990). The trial court determined that the Newton decision applied to the instant case, and granted plaintiff's motion over defendant, State Farm's objection (T 2-9).

The case went to the jury, who returned a verdict in favor of Mr. and Mrs. Dauksis in the amount of $55,000 (T 415).

The case was appealed by State Farm to the Fourth District Court of Appeals on numerous grounds. The Fourth District reversed, but only on the basis of the trial court's reliance on Newton in holding that the threshold defenses set out in F.S. 627.727(7) did not apply in the Dauksis case. In its opinion the Fourth District certified to the Supreme Court any conflict between its decision in Dauksis, and the First District's decision in Newton.

SUMMARY OF ARGUMENT

This appeal to the Supreme Court came about as a result of a decision by the Fourth District Court of Appeal that its decision on the Dauksis appeal is in conflict with the decision of the First District Court of Appeal in the case of Newton v. Auto-Owners Insurance Co., supra. The Fourth District certified to the Supreme Court any conflict between the two decisions.

The issue is whether or not the tort threshold defenses set out in Florida Statute §627.737 are available to the uninsured motorist insurance carrier when the tortfeasor did not have the security on his vehicle required by Florida Statute §627.730-627.7405.

The Fourth District Court of Appeal in Dauksis has said that the threshold defenses do apply; the First District Court in Newton has said they do not.

The decisions conflict insofar as their facts are similar, but each court came to a different conclusion. In each case, the claimant was injured by an uninsured motorist, and made a claim against his own insurance carrier for uninsured motorist benefits. In the Newton case, the First District found the uninsured motorist benefits were recoverable without the threshold restrictions of Florida Statute §627.727(7). In the Dauksis case, the Fourth District found that Dauksis could not make a claim under the uninsured motorist provisions of his insurance policy without being subject to the threshold defenses. The only difference between the two cases is that in Newton the uninsured tortfeasor was a non-resident of Florida, while in Dauksis, the

uninsured tortfeasor was a resident of this state. The Fourth District recognizes this difference in the facts, and relies on this difference to justify their decision.

Petitioners herein will demonstrate that the decision by the Fourth District is in error for the following reasons:

A. Since the tortfeasor did not comply with the minimum security requirements of Florida Statute §627.737, he would not have been able to rely on the threshold defenses had he been sued individually, and because the insurer stands in the shoes of the tortfeasor, it cannot assert the threshold defenses as well.

B. The purpose behind the uninsured motorist statute is to allow the insured the same recovery he could have obtained had the tortfeasor carried liability insurance, not p.i.p. Since compensation for personal injury protection was never contemplated within the meaning of the uninsured motorist statute, it follows that reliance on the tort immunity provided when one has complied with the p.i.p. requirements would be inappropriate.

C. The history behind the uninsured motorist statute does not provide for tort immunity in uninsured motorist cases.

D. The fact that in Newton the tortfeasor was a non-resident while in Dauksis the tortfeasor was a Florida resident makes no difference with regard to the issues on appeal.

E. Because State Farm's insurance policy states that it

will pay any damages which the insured is legally entitled to recover from an uninsured motorist, this language must be strictly construed against State Farm, and as such it cannot rely on the statutory exemption contained in the uninsured motorist statute.

F. The statutory exemption from tort liability contained within section 7 of the uninsured motorist statute is unconstitutional, as it bears no reasonable relationship to the legislative purpose in enacting the uninsured motorist statute.

ARGUMENT

A. SINCE THE UNINSURED TORTFEASOR CANNOT RELY ON THE THRESHOLD DEFENSES, STATE FARM CANNOT EITHER.

Petitioners herein argued to the Fourth District Court of Appeal that since the uninsured tortfeasor would not be entitled to the tort immunity provided in Florida Statute §627.737, State Farm should not be able to rely on this immunity, since it stands in the shoes of the tortfeasor, and can only raise those defenses available to the tortfeasor.

Florida Statute §627.737 sets forth the requirements for the tort exemption and the threshold requirements:

> **§627.737. Tort exemption; limitation on right to damages; punitive damages**
> (1) Every owner, registrant, operator or occupant of a motor vehicle with respect to which security has been provided as required by ss.627.730-627.7405, and every person or organization legally responsible for his acts or omissions, is hereby exempted from tort liability for damages because of bodily injury, sickness, or disease arising out of the ownership, operation, maintenance, or use of such motor vehicle in this state to the extent that that the benefits, unless a person is entitled to maintain an action for pain, suffering, mental anguish, and inconvenience for such injury under the provisions of subsection (2). (Emphasis supplied.)
>
> (2) In any action of tort brought against the owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as required by ss.627.730-627.7405, or against any person or organization legally responsible for his acts or omissions, a plaintiff may recover damages in tort for pain, suffering, mental anguish,

> and inconvenience because of bodily injury, sickness, or disease arising out of ownership, maintenance, operation, or use of such motor vehicle only in the event that the injury or disease consists in whole or in part of:
>
> > a) significant and permanent loss of important bodily function.
> > b) Permanent injury with a reasonable degree of medical probability, other than scarring or disfigurement.
> > c) Significant and permanent scarring or disfigurement.
> > d) Death.

The clear and concise language of this statute indicates that the owner or operator of a motor vehicle is exempted from tort liability and entitled to raise the threshold requirements only when he has provided the security required on his motor vehicle called for in sections 627.730 through 627.7405. In other words, if security is not provided, the tortfeasor cannot be exempted from tort liability and cannot raise the threshold requirements as a defense. See Lasky v. State Farm Insurance Co., infra, at 13-14.

Furthermore, the statute provides that "every person or organization legally responsible for his acts or omissions" is also exempted from tort liability if the security requirements have been met. Since State Farm Insurance Company as the uninsured motorist carrier would be legally responsible for the acts of the uninsured owner/tortfeasor, it could only be exempted from the threshold requirements if the owner/tortfeasor has complied with the security called for in the statute.

In response to this argument, the Fourth District stated:

> "The tortfeasor in this case was uninsured and it

> seems impossible for any uninsured motorist to have the requisite security, which entails the minimum insurance coverage provided in sections 627.730-627.7405. Dauksis, at D858.

This statement is clearly mistaken in light of the fact that many individuals can comply with the minimum security requirements while still remaining uninsured for bodily injury purposes.

There are many thousands of people in this state who comply with the financial responsibility requirements by purchasing the minimum insurance required under the law. However, this minimum does not include liability insurance coverage. Therefore, all of these individuals would be uninsured for uninsured motorist purposes, but would still be entitled to assert the threshold defenses had they been sued individually.

It seems clear that the legislature intended part of the purpose of the security requirements to be to award those people who comply with the financial responsibility statute to be immune from suit unless the claimant has met the injury threshold, and at the same time punishing those who have not complied by refusing them the ability to rely on the threshold defenses. See Lasky v. State Farm Insurance Co., infra.

Thus, it appears that there are 3 classes of motorists in this state: (1) Those that carry p.i.p., property damage and liability coverage and comply with the statute; (2) Those that carry p.i.p. and property damage only, who comply with the minimum requirements of the statute, but who would be uninsured for uninsured motorist purposes (but also could rely on the threshold defenses); (3) Those who carry no insurance coverage.

It must be remembered that this is a limited, qualified immunity, inuring only to those who comply with the statute. 31 Fla. Jur 2d Insurance §778.

So, when the Fourth District Court of Appeal says that it is impossible for any uninsured motorist to have the required security, it is clearly mistaken. In the case of individuals having full coverage who are involved in an underinsured motorist claim, the uninsured motorist insurer would be entitled to assert the threshold defenses. In cases involving those who only had the minimum insurance coverage, the uninsured motorist carrier would be able to rely on the threshold defenses as well. It is only those individuals who have no insurance coverage where the uninsured motorist carrier could not raise the threshold defenses. Hopefully, the majority of drivers in the state carry some insurance coverage, in compliance with the statute.

The problem here is that Mr. Dauksis is one of those individuals who has complied with the statute. Not only that, but he had coverages well in excess of the minimum requirements, and uninsured motorist coverage too. If he sued the tortfeasor directly, there would be no threshold defenses. It seems that Mr. Dauksis is being penalized because he had full coverage. He paid an additional premium to obtain uninsured motorist coverage. In all those cases when the tortfeasor was uninsured, and a uninsured motorist claim is made, it is the claimant who has complied with the statute, not the tortfeasor. The insurance carrier has not paid a premium so as to be entitled to assert the threshold defenses. The insurance carrier receives all of the benefits of

the tort immunity without assuming any of the burden shared by all those individuals who are entitled to claim the immunity by reason of their compliance with Florida law by purchasing the required insurance coverage. So State Farm gets paid by those individuals, such as Mr. Dauksis, to purchase insurance which they must buy in order to comply with the law, and then State Farm gets to tell those same individuals that it is entitled to assert the threshold defenses, for which privilege it has paid or given up nothing. It's like having your cake and eating it too - it's just not fair.

B. UNINSURED MOTORIST COVERAGE IS INTENDED TO ALLOW THE INSURED THE SAME RECOVERY HE COULD HAVE OBTAINED HAD THE TORTFEASOR CARRIED LIABILITY INSURANCE, NOT P.I.P.

Following this line of thought a step further brings us to the portion of the Fourth District opinion where it states:

> "Yet the supreme court has held the public policy of this state to be that every insured is entitled to recover for damages he or she would have been able to recover if the offending motorist had maintained a policy of liability insurance. Carguillo v. State Farm Auto Insurance Company, 529 So.2d 272 (Fla. 1988) (citing Mullins v. State Farm Mutual Insurance Company, 252 So.2d 229 (Fla. 1971) (emphasis in original).

The crucial point in looking at this language is that the court in Carguillo and Mullis is talking about liability insurance, not p.i.p. insurance. It seems clear that, in keeping with this idea as it relates to a non-resident tortfeasor, that a non-resident could carry large amounts of liability coverage, but still would not be entitled to rely on the threshold defenses because he has not fully complied with Florida's financial responsibility laws.

The Fourth District goes on to say:

> "The supreme court also interpreted the uninsured motorist statute in Dewberry v. Auto Owner's Insurance Co., 363 So.2d 1077 (Fla. 1978). In that case the court held that uninsured motorist coverage is intended to allow the insured the same recovery which would have been available to him had the tortfeasor been insured to the same extent as the insured himself. Id. at 108. We find Dewberry to be dispositive of the case at bar." Dauksis, at D859.

Once again, in the Dewberry case, the court is talking about

liability coverage, not p.i.p.. In holding that Dewberry is dispositive of the Dauksis case, the Fourth District does not take into account the fact that the issues in the Dewberry case had to do with stacking of motor vehicle insurance coverages, and had nothing to do with the concept of the tort immunity in uninsured motorist cases. The context in which the statement "allow the insured the same recovery which would have been available to him had the tortfeasor been insured..." was meant to prevent an insured from failing to set off from his recovery the amount of the tortfeasor's liability insurance coverage. To say that this statement is dispositive of the issues in this appeal is to take that statement out of context, since the court in Dewberry also held, in interpreting the basic theory of uninsured motorist coverage:

> "That theory is that uninsured motorist coverage is meant to compensate the plaintiff for a deficiency in the tortfeasor's personal liability insurance coverage. We agree." Dewberry, at 1081 (emphasis added).

The Fourth District seems to have interpreted the Supreme Court's opinion in Dewberry (uninsured motorist coverage is intended to allow insured the same recovery... had the tortfeasor been insured to the same extent as insured himself) to mean that the "same extent as insured himself" includes the p.i.p. coverage necessary to permit reliance on the threshold defenses. However, the court in the Dewberry, Caguillo and Mullis cases refers specifically to liability insurance only, not p.i.p. The Petitioners herein respectfully submit that the Fourth District interpretation of the above mentioned Supreme Court decisions is

mistaken, since the Court in its decisions has specifically limited the definition of uninsured motorist coverage to be compensation for difficiencies in the tortfeasor's liability coverage, and has never intended uninsured motorist coverage to include p.i.p. insurance, which would be necessary in order to rely on the tort immunity afforded by Florida Statute §627.737 and Florida Statute §627.727(7).

Furthermore, as the court in Newton points out, the language of §627.727 specially provides that uninsured motorist insurance provides coverage "over and above, ... benefits available to an insured under... personal injury protection benefits," and does not duplicate such benefits. Florida Statute §627.727(1); Newton, at 1313. Therefore, pursuant to the clear language of the statute, uninsured motorist insurance was never meant to include p.i.p. insurance, and was only meant to compensate an injured party for a difficiency in the tortfeasor's liability insurance coverage.

Of course, the p.i.p. benefits as described in the statute were meant to include payment for lost wages and medical bills, rather than the "benefit" of the tort immunity available to those who have complied with the statute by purchasing the minimum requirements. But the point is that the concept of uninsured motorist insurance - allowing the insured the same recovery had the tortfeasor been insured to the same extent as insured himself - is talking about the liability insurance of the insured and was never meant to include the tort immunity available to the insured as a result of his compliance with the no-fault statute.

C. THE HISTORY BEHIND THE UNINSURED MOTORIST STATUTE DOES NOT PROVIDE FOR TORT IMMUNITY IN THIS SITUATION.

In the case of Allstate Insurance Co. v. Boynton, 486 So.2d 552 (1986), this court discussed the history and purpose behind the uninsured motorist statute. This court stated, in part:

> "The legislature wisely enacted a scheme whereby a motorist may obtain a limited form of insurance coverage for the uninsured motorist, by requiring that every insurer doing business in this state offer and make available to its automobile liability policyholders uninsured motorist coverage in an amount equal to the policyholders automobile liability insurance. The policyholder pays an additional premium for such coverage. The uninsured motorist statute provides that coverage is 'for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury.' Florida Statute §627.727(1). The uninsured motorist coverage, in purpose and effect, provides a limited form of insurance coverage up to the applicable policy limits for the uninsured motorist. The carrier effectually stands in the uninsured motorist's shoes and can raise and assert any defense that the uninsured motorist could urge. In other words, uninsured motorist coverage is a limited form of third party coverage inuring to the limited benefit of the tortfeasor to provide a source of financial responsibility if the policyholder is entitled under the law to recover from the tortfeasor. It is not first party coverage even thought the policyholder pays for it. In first party coverage, such as medical, collision or theft insurance, fault is not an element. The insurance carrier pays even though the policyholder is totally at fault. With uninsured motorist coverage, the carrier pays only if the tortfeasor would have to pay, if the claim were made directly against the tortfeasor. at 557 (emphasis added)

As the court points out, uninsured motorist coverage inurs to the benefit of the tortfeasor, not the insurance company. The carrier pays only if the tortfeasor would have to pay, if the claim were made directly against the tortfeasor. As stated earlier, if the claim were made directly against the tortfeasor he would not be able to rely on the threshold defenses, and as such the insurance carrier should not be able to as well.

It is interesting to note that the Supreme Court in Boynton merely states that the insurer has the tortfeasor's substantive defenses available to it (p. 558), but does not delineate what those defenses may be. Clearly, this is because the defenses may differ from case to case. It is also interesting to note that the Supreme Court recognizes that there are certain advantages to the plaintiff in an uninsured motorist claim, i.e., that the statute of limitations is a year longer in a contract action than a tort action (p 558). The Supreme Court specifically does not rule on these discrepancies, nor does it rule on the issue of the threshold defenses. The opinion does go to say:

> "There is another reason for our decision here. Widiss writes, in the context of whether the insurer should be able to claim the protection of the tortfeasor's tort immunities:
>
> > 'The issue raised by such immunities is whether, for purpose of the uninsured motorist coverage, the claimant is 'legally entitled to recover' as contemplated in the endorsement...'
>
> Professor Prosser states that 'such immunity does not mean that conduct which would amount to a tort on the part of the other defendants is not equally tortious in character, but merely that for protection of the particular defendant or interests which he represents, he is given absolution from liability.' [W. Prosser, Law of Torts, 996 (3d ed. 1964.] Professor Prosser's language seems to suggest that the injured party is legally entitled to recover, but that the

> immunity involved absolves the defendant from liability...
>
> Boynton, at 558 citing A. Widiss, A Guide to Uninsured Motorist Coverage, (1969)

Clearly, a tort committed by one who has the security required in Florida Statute §627.730, et seq. is no less tortious than one committed by one who has not met the security requirement. However, the whole purpose of Florida Statute §627.737 is to establish an immunity for those who have met the security requirement as opposed to those who have not. Once can only be entitled to the threshold defenses if one has complied with the statute requirements. The tortfeasor in Mr. Dauksis's case did not comply with the security requirement, and therefore could not have availed himself of the threshold defenses had Mr. Dauksis chosen to sue him directly, rather then making an uninsured motorist claim. By attempting to raise the threshold defense, State Farm is trying to obtain more defenses than that to which the tortfeasor would have otherwise been entitled. Thus, State Farm would gain an advantage for which terms of its policy does not provide.

The Boynton ruling held that, although the plaintiff had a claim which could be reduced to a judgment, the immunity provided under the worker's compensation statute was the more important consideration, and therefore controlling. The distinction between the Boynton case and the present case is that in the Boynton case, the employer complied with the requirements of the worker's compensation statute by providing worker's compensation insurance to his employees. By doing so, he was entitled to the immunity

provided under the statute. In the Dauksis case, the tortfeasor did not comply with the security requirements of Florida Statute §627.730, et seq., and therefore he could not claim the tort immunity available to those who meet the security requirements. Had the employer in Boynton failed to obtain the worker's compensation insurance required by the statute, he would not have been entitled to claim the immunity granted to those who do comply with the Florida Statute §440.11. If this had been the case, then the uninsured motorist claim would have been allowed, just as in the instant case, the immunity provided under §627.737 is waived when the security requirements have not been met, and so the threshold defense would not apply in this uninsured motorist claim.

The Fourth District, in interpreting the Boynton case states:

> In Boynton the supreme court held that under section 627.727(1), the uninsured motorist coverage carrier stands in the same shoes as the uninsured motorist, "and can raise and assert any defense that the uninsured motorist could urge." Boynton, 485 So.2d at 557. This court has interpreted Boynton to hold that the insurer, in a case involving uninsured motorist coverage, has the tortfeasor's defenses available to it. See Allstate Ins. Co. v. Candreva, 497 So.2d 980 (Fla. 4th DCA 1986). Thus, it seems that if the tortfeasor had the permanency defense available to him in the case at bar, then State Farm should have been able to assert the defense and force Dauksis to prove that his injuries were permanent, beyond the threshold stated in section 627.737. Dauksis, at D858.

The Fourth District is mistaken here in its assumption that the tortfeasor had the permanency defense available to him, so that State Farm could assert this defense. As Petitioner has made clear (hopefully so) in Section A of his

argument herein, the tortfeasor could not have had the permanency defense available to him, because of his non-compliance with the security requirements of the no-fault statute, §627.737.

D. THE FACT THAT IN NEWTON THE TORTFEASOR WAS A NON-RESIDENT, WHILE IN DAUKSIS THE TORTFEASOR WAS A FLORIDA RESIDENT MAKES NO DIFFERENCE WITH REGARD TO THE ISSUE ON APPEAL.

In holding that State Farm was entitled to assert the permanency defense, the Fourth District stated:

> "We do not believe that Newton is applicable here because that case seems limited to its specific facts, which involve a non-resident uninsured motorist." Dauksis, at D859.

This opinion is wrong for two reasons: first, that the Newton decision is in no way relying on the fact that the tortfeasor was a non-resident, and second, that there is no distinction at all (for the purpose of the issues in this appeal) between a non-resident uninsured tortfeasor, and a resident uninsured tortfeasor.

In reading the Newton case, nowhere within the opinion section is there any rationale for the decision which takes into consideration that the tortfeasor was a non-resident. Instead, all of the reasoning behind the decision is directed to the proposition that since the plaintiff was legally entitled to recover from the tortfeasor, the uninsured motorist insurer should be required to provide coverage in accordance with the terms of its contract. The court in Newton does not limit its decision to non-resident tortfeasors as the Fourth District seems to think. Even if it did, this reasoning would be faulty because a claimant would be "legally entitled to recover" from either a non-resident or a resident uninsured motorist within the meaning of §627.727 and the language of the insurance policy. In other words, both a

non-resident and a resident tortfeasor who is uninsured would not have the security required by §627.737 which is necessary in order to be eligible to rely on the threshold defenses contained in that statute. Therefore, for the purpose of interpreting the uninsured motorist statute, there is no difference between a resident or a non-resident uninsured tortfeasor.

The Supreme Court in the case of Spence v. Hughes, 500 So.2d 538 (1987) has indicated that the only reason that a non-resident would not be entitled to the tort exemption is that he has not complied with the security requirements under Florida law. If a non-resident complies with the security requirements, he is entitled to the same tort immunity that a resident enjoys (who has complied with the law). The court makes it perfectly clear that the mere fact that one is a non-resident is an insufficient reason to preclude them from the protection afforded by the no fault statute. Therefore, the Fourth District opinion (and State Farm's position) that the Newton decision is based solely upon its specific fact that the tortfeasor was a non-resident, and is thus not applicable to the Dauksis case cannot be correct. The Spence case is controlling for the proposition that the key element is compliance with the security requirements of Florida law, and not the distinction between resident to non-resident. Once again, the point is that in Newton, the reason that the claimant did not have to meet the tort threshold was that the tortfeasor was uninsured, not because he was a non-resident. If State Farm is permitted to raise the threshold defenses against Mr. Dauksis, then this would create a special class of individuals (uninsured

tortfeasors who are residents of Florida) to whom the threshold defenses would apply, as opposed to uninsured non-resident tortfeasors, to whom the immunity would not apply. Such a classification would result in discrimination against those non-resident tortfeasors who are uninsured compared to resident torfeasors who are uninsured, solely for the reason that they are non-residents. Since the Supreme Court in Spence has said that you cannot discriminate against a non-resident who has complied with Florida's p.i.p. requirements, it follows for the same reasons that you cannot discriminate against a non-resident uninsured tortfeasor as opposed to a resident uninsured tortfeasor. To do so would deny equal protection and violate the 14th Amendment to the U.S. Constitution as well as discrimiate against non-residents and impinge upon the fundamental right of travel. See Spence, supra and Spence v. Hughes 485 So.2d 903 (5th DCA 1986).

What is the difference for the purposes of the issue in this case between a resident and a non-resident uninsured motorist? In either case, the owner of the vehicle was uninsured, and the claimant must look to his own uninsured motorist coverage for compensation for his injuries. In either case, the owner of the uninsured vehicle would not have the security required to avail himself of the threshold defenses of §627.737. It is true that there are different reasons for the uninsured motorist in each of these scenarios for not having the required coverage, i.e., that the Florida resident is required to carry security set out in section 627.730-7405 and failed to comply with the statute, while

the non-resident is not required to comply with the requirements of Florida Statutes. This distinction is unimportant, however, because in both cases (resident and non-resident) the vehicle owner was uninsured, so regardless of the reason the claimant would have to look to his own uninsured motorist coverage for just compensation. In both cases, if the claimant had elected to sue the tortfeasor directly for compensation for his injuries, the tortfeasor would not be able to rely on the threshold defenses as part of the defense to the claim. This is why there should be no distinction between the Newton case and the Dauksis case. The theory behind the Newton decision and the rationale used in forming that decision is that the insurer should be bound by the language in its policy. Newton, at 1313. In both the Newton case and the Dauksis case, the insurer was a Florida insurer. In both cases, the policy language at issue is virtually identical. (We will pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle. R 447-475) In fact, it seems as though Dauksis should be even more entitled to make a uninsured motorist claim without threshold defenses than Newton. In Dauksis' case the tortfeasor was required by Florida law to carry the required security, while in Newton the tortfeasor was not. The failure of the tortfeasor to carry this security in Dauksis was a violation of Florida law. At least in Newton the uninsured motorist carrier, by having to pay uninsured motorist compensation without having the advantage of the threshold defenses was not benefitting from the tortfeasor's violation of the law. In Dauksis, State Farm would be benefitting

from the tortfeasor's failure to comply with Florida Statutes if it can rely on the threshold defenses when its policy does not speak to this issue. So State Farm is receiving a benefit which is not even addressed in its policy, when in fact the law provides exactly the opposite - that the policy language is to be construed strictly against the insurer and most strongly in favor of the insured. (30 Fla Jur 2d, Insurance 351) In keeping with this line of thought, it must be asked whether State Farm considered this advantage in selling this policy to Mr. Dauksis. Did State Farm reduce its uninsured motorist premium to Mr. Dauksis because it was receiving the advantage of being able to rely on the threshold defenses in any uninsured motorist case? Did it even notify Mr. Dauksis that it would be able to utilize the threshold defenses, in any situation that might arise? It did not, and in fact only told Mr. Dauksis that it would pay uninsured motorist benefits for any damages which he was "legally entitled to collect" from an uninsured motorist. (R 457) Since it is undisputed that Mr. Dauksis would be legally entitled to collect damages from the uninsured motorist without reliance on the threshold defenses, a strict interpretation of the State Farm policy language requires State Farm to pay uninsured motorist benefits without using the threshold defenses.

E. THE LANGUAGE OF STATE FARM'S INSURANCE POLICY MUST BE STRICTLY CONSTRUED AGAINST STATE FARM, AND THUS IT CANNOT RELY ON THE STATUTORY EXEMPTION FROM TORT LIABILITY.

It must be pointed out that this is a case in which a crucial issue is the interpretation of the policy language of an insurance contract that was written by State Farm. The court in Newton recognized that this was the crucial issue in that case as well:

> "The policy language at issue in this case states unequivocally that the respective insurer will pay damages for bodily injury sustained by its insured in an accident involving an uninsured motor vehicle, when the insured is 'legally entitled to recover' from the owner or operator of the uninsured motor vehicle. It is undisputed that appellants sustained bodily injuries in an accident with an uninsured motorist. It is also undisputed that appellants have a claim for damages against the uninsured tortfeasor which could be reduced to judgment in a court of law. Thus, the critical question in this case is whether the insurance carriers should be bound by the language of their contracts with the insureds, or whether they should be afforded the exemption from tort liability available under the provisions of sections 627.727(7) and 627.737(2), Florida Statutes." (emphasis added) Newton, at 1312.

The court explains:

> "Reasons for holding the insurers to the terms of their agreement include the rule that the terms of a contract should be construed strictly against the party drafting the agreement, and that policy language should be construed liberally in favor of the insured, and strictly against the insurer so as to effect the dominant purpose of payment. Ellsworth v. Insurance Company of North America, 508 So.2d 395, 399-400 (Fla. 1st DCA 1987); Cavalier Insurance Corp. v. Myles, 347 So.2d 1060, 1062 (Fla. 1st DCA 1977); Davis v. U.S. Fidelity & Guaranty Co. of Baltimore, MD., 172 So.2d 485, 486-87 (Fla. 1st DCA 1965); Webster v. Valiant Insurance Co., 512 So.2d 971 (Fla. 5th DCA 1987); Dorfman v. Aetna Life Insurance Co., 342 So.2d 91,

> 93 (Fla. 3d DCA 1977); 31 Fla. Jur.2d, Insurance 743 (1981). An additional reason for holding the insurer to the terms of its contract with its insured is that the policyholder pays an additional premium for such coverage, and the carrier pays only if the tortfeasor would have to pay. Boynton, 486 So.2d at 557. Moreover, the insurer may bring suit against the tortfeasor to recover all sums it has paid its insured under the uninsured motorist provision of the subject policy. Id., at 558. Newton, at 1312.

The same reasoning applies in the Dauksis case. State Farm's policy provides that it will pay any damages which the insured is "legally entitled to collect" from an uninsured motorist. (R-457) There is no question that Mr. Dauksis was legally entitled to collect from the tortfeasor since it was a rear-end collision and liability was admitted (T-26), and State Farm should be held to the terms of their contract.

In addition, as the court in Newton states:

> "... since the uninsured motorist does not have a substantive defense, the uninsured motorist insurer's rights to subrogation would not be frustrated if they would be required to pay the claims of their insureds." Newton, at 1312.

In the Dauksis case, State Farm has a right of subrogation against the tortfeasor. The tortfeasor would not be able to raise the threshold defenses in response to State Farm's claim. Unlike Boynton, the insurer's right of subrogation would not be fustrated by a substantive defense.

The problem here is that the insurance policy says that the insurance company will pay any damages which the insured is legally entitled to collect from an uninsured motorist. It does not say that its legal liability for these damages extends to only

those circumstances where the insured has met the tort threshold. It says it will pay for any damages. The clear, precise and unambiguous language must be strictly construed against State Farm, in spite of §627.727 (7). This is the same situation that occurred that occurred in Newton, and the court there decided that, because the policy language must be strictly construed against the insurer, that public policy underlying uninsured motorist coverage demands that the insurer be held to the terms of their contract and that they must provide uninsured motorist benefits without the consideration of the tort threshold defenses.

In addition, the State Farm policy specifically states that, in deciding upon recovery in uninsured motorist cases, two questions must be decided:

> 1) Is the insured legally entitled to collect damages from the owner or driver of an uninsured motor vehicle, and
> 2) If so, in what amount? (R 459)

Once again, there is no mention of any threshold restrictions within the policy language. The policy language is clear and concise, that the only two questions are whether the insured is legally entitled to collect, and if so, how much. This language must be strictly construed against State Farm so as to affect the dominant purpose of payment to the insured, Mr. Dauksis. See Newton, supra; 30 Fla Jur 2d Insurance 351-2 citing numerous cases; see also State Farm Mutual Auto Insurance Co. v. Mallard, 548 So2d 733 (3rd DCA 1989).

F. FLORIDA STATUTE §627.727 (7) IS UNCONSTITUTIONAL AS IT BEARS NO REASONABLE RELATIONSHIP TO THE LEGISLATIVE PURPOSE BEHIND THE UNINSURED MOTORIST STATUTE.

There is another constitutional issue which needs to be addressed here. It has to do with the constitutionality of section (7) of §627.727 as it relates to the issues in this case, considering the history and purpose behind the No-Fault law, and the uninsured motorist statute.

The history and rationale of the No-Fault law is explained by the court in the case of Lasky v. State Farm Insurance Co., 296 So.2d 9 (1974). The court stated:

> Florida Statute §627.733(1), (predecessor to §627.737) FSA, requires that:
>
> "Every owner or registrant of a motor vehicle required to be registered and licensed in this state shall maintain security as required by subsection (3) of this section in effect continuously throughout the registration or licensing period."
>
> Florida Statute §627.733(3), F.S.A., requires that security be provided either by insurance for the benefits contained in the no-fault law or by such other method approved by the department of insurance as providing equivalent security.
>
> Additionally, Florida Statute §627.733(4), F.S.A., provides that an owner of a motor vehicle as to which security is required and who does not have security in effect at the time of an accident has no tort immunity, but is personally liabile for payment of the benefits under Florida Statute §627.736, F.S.A., for personal injury and has all the obligations of an insurer under the no-fault insurance act. 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 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 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.
>
> Protections are afforded the accident victim by this Act in the speedy payment by his own insurer of medical costs, lost wages, etc., while foregoing the right to recover in tort for the same benefits and (in a limited category of cases) the right to recover for intangible damages to the extent covered by the required insurance (Florida Statute §627.737(1), F.S.A.); furthermore, the accident victim is assured of some recovery even where he himself is at fault. In exchange for his former right to damages for pain and suffering in the limited category of cases where such items are preempted by the act, he receives not only a prompt recovery of his major, salient out-of-pocket losses-even when he is at fault-but also an immuity from being held liable for the pain and suffering of the other parties to the accident if they should fall within this limited class where such items are not recoverable. Lasky, at 14 (emphasis added).

It can be seen that the rationale behind the No-Fault law was to be a trade-off of the right to sue for medical bills and lost wages in exchange for the right to recover p.i.p. benefits in all cases, regardless of fault, from one's own insurance carrier. The unlimited right to sue for injuries sustained was given up and in exchange immunity from suit was granted if one had complied with the security requirements. The No-Fault law was a trade-off of certain rights for other rights, for the purpose of:

> ...a lessening of the congestion of the court system, a reduction in concomitant

> delays in court calendars, a reduction of automobile insurance premiums and an asssurance that persons injured in vehicular accidents would receive some economic aid in meeting medical expenses and the like, in order not to drive them into dire financial circumstances with the possibility of swelling the public relief rolls. Lasky, at 16.

The court in Lasky recognized that:

> The test to be used in determining whether an act is violative of the due process clause is whether the statute bears a resonable relation to a permissible legislative objective, and is not discriminatory, arbitrary or oppressive. Lasky, at 15.

Thus, the Supreme Court decided that this giving up of some rights in order to obtain others bore a reasonable relation to the legislative purpose in enacting the law, and found that the law was constitutional.

The history and purpose behind the uninsured motorist statute is expressed in numerous cases interpreting this statute. The purpose of the uninsured motorist statute is to allow recovery by the insured to the same extent as if the tortfeasor had carried liability insurance. See Dewberry, supra; Aetna Casualty and Surety Company v. Ilmonen, 360 So.2d 1271 (3rd DCA (1978)); Biondino v. Southern Farm Bureau Casualty Insurance Company, 319 So.2d 152 (2nd DCA (1975)); Mullis, supra; Carguillo, supra.

The courts have also held that the purpose of this statute is designed for the protection of injured persons, and not for the protection of insurance companies. See State Farm Mutual Auto Insurance Company v. Drein, 358 So.2d 39 (3rd DCA (1978)); Boulnois v. State Farm Mutual Auto Insurance Company, 296 So.2d 264 (4th DCA (1973)); Salas v. Liberty Mutual Fire Insurance Company, 273 So.2d 429 (1971), Brown v. Progressive Mutual Auto Insurance Company, 249 So.2d 429 (1971). (emphasis added)

The history of the uninsured motorist statute is also discussed in Boynton, supra. The court stated:

> Uninsured motorist coverage therefore arose in the context of providing a less cumbersome method for an insured to receive payment from the party with the ultimate financial responsibility, the insurer. Uninsured motorist coverage, with its normal procedure of settling disputes through arbitration, would save both the insured and insurer the time and expense of a trial against the uninsured motorist, and would also help the insurer avoid the complications inherent in a trial where the interests of the tortfeasor and the insurer may not necessarily coincide. Boynton, at 557.

And the court in Hughes v. State Farm Mutual Auto Insurance Company, 294 So.2d 398 (1st DCA 1974), held, in interpreting the provisions of §627.727 that:

> The coverage required by statute relating to "uninsured motorists" coverage and the coverage required by the Florida Automobile Reparations Reform Act are two separate and distinct categories of insurance coverage provided in the policy. The first category assumes the availability of a tort action against a third party, whereas the latter is based upon the concept of "no fault". Hughes, at 400.

The decision in Hughes indicates that the uninsured motorist statute is in a separate category than the no-fault statute, and as such it should be interpreted separately. The threshold requirements set forth in the no-fault statute bore a reasonable relationship to the legislative purpose to justify this restriction of claimants rights. The provisions of §627.727(7), requiring a threshold injury in uninsured motorist cases does not bear a reasonable relationship to the legislative purpose in enacting that statute. The threshold restictions bear absolutely no relationship to the purpose of the uninsured motorist statute, which is to provide the equivalant of liability insurance to an injured person, and compensate him for damages caused by an uninsured motorist that he is legally entitled to recover. Therefore, one cannot justify the threshold defenses set out in §627.727(7) just because this is a no-fault state. The two statutes are separate and distinct, and the basis behind the insertion of threshold requirements must be interpreted in the context of the purpose of the uninsured motorist statute, and not in the context of the no-fault law and its concept of limited tort immunity.

Furthermore, the "less cumbersome method" expressed in Boynton as the context in which the idea of uninsured motorist coverage arose no longer exists in the present day application of uninsured motorist law. The time and expense that was to be saved by arbitration of uninsured motorist cases, and the uncluttering of court dockets has been thwarted by the insurance companies themselves, by inserting provisions in their policies allowing the

insurance company to chose between an arbitration and a jury trial. (See R-447-475) The insurance company invariably chooses a jury trial rather than arbitration (such as in the Dauksis case), the time and expense which was to be saved is then wasted, and the jury trial dockets are swelled by these cases, in direct contradiction to the intended purpose of this statute.

The provisions of §627.737(7) are unconstitutional. The threshold defenses bear no reasonable relationship to the legislative purpose in enacting the statute, as they do to the tort immunity of the no-fault statute and as such they are arbitrary, discriminatory and oppressive, in violation of the due process test set forth in Lasky above. The cases are no longer arbitrated, causing needless expense and cluttering of our court dockets. Finally, the threshold requirements only benefit the insurance company, and not the insured, in direct contradiction to the Dien, Boulnois, Salas and Brown cases cited above. There is absolutely no reason to uphold the constitutionality of this provision of the statute. Pursuant to Lasky, an unconstitutional portion of a statute can be eliminated without declaring the entire statute invalid as long as the invalid portion is not essentially and inseparably connected in substance to the basic purpose of the statute. Lasky, at 21. Since section (7) of §627.727 bears no reasonable relationship to the purpose behind the statute, and is not essentially connected to the purpose of the rest of the statute, it is respectfully submitted that section 7 be declared unconstitutional, and severed from the remainder of the uninsured motorist statute.

CONCLUSION

Pursuant to Boynton, the tortfeasor stands in the shoes of the tortfeasor, and can assert any defense the tortfeasor can urge. From the foregoing argument it is clear that those defenses do not include the permanency defense. However, the uninsured motorist statute makes provision for the permanency defense in section (7). The Newton court decided that the public policy considerations of holding the insurer to the terms of its contract were controlling as opposed to the provisions of 627.727 (7). The same reasoning should apply in the Dauksis case, since the issue involved and the policy language is the same. Additionally, the history of the uninsured motorist statute indicates that its purpose was to compensate the injured party to the same extent as if the tortfeasor had carried liability insurance, and was not meant to insulate the uninsured motorist insurer from liability by providing it with tort immunity.

Finally, since there is no reasonable relationship between the legislative purpose in enacting the uninsured motorist statute and the tort immunity provided in section (7) of that statute, that section is unconstitutional and should not be applied in considering uninsured motorist claims.

For the foregoing reasons, it is respectfully requested that the Fourth District's opinion be reversed, with instructions to reinstate the judgment of the trial court in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was mailed this 5th day of May, 1992, to: RICHARD A. SHERMAN, ESQ., Law Offices of Richard A. Sherman, P.A., Attorneys for Defendant/Respondent, State Farm, 1777 South Andrews Avenue, Suite 302, Ft. Lauderdale, Florida 33316; JAMES T. SPARKMAN, ESQ., Barnett, Clark & Barnard, Attorneys for Defendant/Respondent, State Farm, 110 Tower, Suite 1800, 110 Southeast 6th Street, Ft. Lauderdale, Florida 33301; and JEFFREY WOLFSON, ESQ., Co-Counsel for the Plaintiffs/Petitioners, Dauksis, 644 Southeast 5th Avenue, Ft. Lauderdale, Florida 33301.

JACOBSON, COHEN & COHEN, P.A.
Attorneys for Plaintiff/Petitioners
800 N.W. 62nd Street
Suite 200
Ft. Lauderdale, Florida 33309
(305)491-6444

By: _____
DANIEL E. JACOBSON, ESQ.

APPENDIX

A joint project of the
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STATE OF FLORIDA
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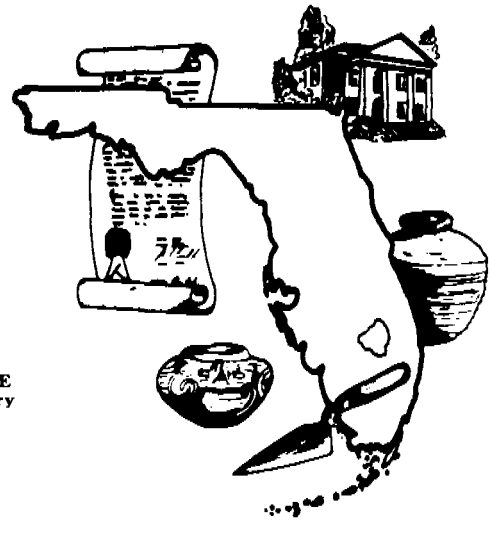

047

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 79,662

FILED
SID J. WHITE
MAY 18 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

JOSEPH DAUKSIS and JANICE DAUKSIS,

Plaintiffs/Petitioners,

-vs-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and RAMIRO BENAVIDEZ,

Defendants/Respondents.
_____/

APPENDIX TO INTIAL BRIEF OF PLAINTIFFS/PETITIONERS JOSEPH DAUKSIS AND JANICE DAUKSIS APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

Daniel E. Jacobson, Esq.
JACOBSON, COHEN & COHEN, P.A.
800 N.W. 62nd Street
Suite 200
Ft. Lauderdale, Florida 33309
(305)491-6444

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1992

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellant/ Cross Appellee,

v.

JOSEPH DAUKSIS and JANICE DAUKSIS,

Appellees/ Cross Appellants,

and

RAMIRO BENAVIDEZ,

Appellee.

CASE NO. 91-0818.

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

Opinion filed April 1, 1992

Appeal and cross appeal from the Circuit Court for Broward County; Paul M. Marko III, Judge.

Rosemary Wilder and Richard A. Sherman of Law Offices of Richard A. Sherman, P.A., Fort Lauderdale, for appellant/ cross appellee.

Daniel E. Jacobson of Jacobson, Cohen & Cohen, P.A., Fort Lauderdale, for appellees/cross appellants.

POLEN, J.

On June 10, 1988, Joseph Dauksis' car was struck from behind by an uninsured motorist. Dauksis presented a claim for uninsured motorist benefits to his carrier, State Farm Mutual

Automobile Insurance Co. (State Farm). While Dauksis claimed that his injuries included a herniated disk, State Farm maintained that the appellee's injuries were limited to soft tissue damage.

The case proceeded to trial after Dauksis refused two offers of judgment. Dauksis moved in limine to exclude testimony concerning the lack of permanency of his injury, which the trial court granted based on Newton v. Auto Owners Insurance Co., 560 So.2d 1310 (Fla. 1st DCA), rev. denied, 574 So.2d 139 (Fla.), and rev. denied, 574 So.2d 141 (Fla. 1990).

At trial, State Farm called Dr. Paul Baxt as an expert witness. During cross examination, appellee's counsel asked the doctor whether he had ever been treated or hospitalized for mental or psychological problems. State Farm objected and the trial court sustained the objection. The next day State Farm moved for a mistrial and the court reserved ruling until after the verdict was presented. The motion for mistrial was ultimately denied.

The jury returned a verdict for the appellee in the amount of $55,000. State Farm moved for a new trial based on alleged improper comments by appellee's counsel in closing, the alleged improper question asked to Dr. Baxt, the elimination of the defense of lack of permanency of the appellee's injuries, and the alleged excessive nature of the verdict. The trial court denied State Farm's motion for new trial, and State Farm therefore appealed the final judgment.

State Farm moved to offset the verdict based on recovered PIP benefits, which the trial court granted. Dauksis cross appealed, claiming that the trial court erred in making the set off because there were no itemizations on the verdict form which would show that the jury did not already make the necessary deductions.

The focal issue in this case is whether the plaintiff in a personal injury case against his or her uninsured motorist carrier must meet and prove the permanency requirements of section 627.737, Florida Statutes (1989). The trial court, in excluding evidence of the lack of permanency of Dauksis' injuries, relied on Newton v. Auto Owner's Insurance Co. State Farm argues in this appeal that Newton is in conflict with Allstate Insurance Co. v. Boynton, 486 So.2d 552 (Fla. 1986), and other case law concerning uninsured motorist coverage. We find that Newton is inapplicable to the case at bar and we therefore reverse.

In Newton the issue before the court was

> whether a Florida insured must meet the threshold requirements of section 627.737(2), Florida Statutes (1984), when the claim is based upon the alleged negligence of an uninsured, nonresident motorist, and where the subject policy does not require the insureds to meet such threshold requirements, and specifically states under the uninsured motorist provision that the company will pay damages for bodily injury which the insureds are legally entitled to recover from the owner or driver of an uninsured motor vehicle.

Newton, 560 So.2d at 1311. The trial court in Newton had ruled that the plaintiff had to meet the threshold requirements to recover uninsured motorist benefits, but the First District Court of Appeal reversed.

The Newton court distinguished Boynton in part and reasoned that the threshold requirements did not have to be met in uninsured motorist claims as with regular PIP claims because of the policy behind section 627.727(1), Florida Statutes (Supp. 1984), which is to provide coverage "over and above . . . benefits available to an insured under . . . personal injury protection benefits." Id. at 1313. The court also found that its decision was in accord with Boynton because the uninsured motorist insurer's subrogation rights are not prejudiced if they are required to pay the claims of their insureds. Id. at 1312.

In Boynton the supreme court held that under section 627.727(1), the uninsured motorist coverage carrier stands in the same shoes as the uninsured motorist, "and can raise and assert any defense that the uninsured motorist could urge." Boynton, 486 So.2d at 557. This court has interpreted Boynton to hold that the insurer, in a case involving uninsured motorist coverage, has the tortfeasor's defenses available to it. See Allstate Ins. Co. v. Candreva, 497 So.2d 980 (Fla. 4th DCA 1986). Thus, it seems that if the tortfeasor had the permanency defense available to him in the case at bar, then State Farm should have been able to assert the defense and force Dauksis to prove that his injuries were permanent, beyond the threshold stated in section 627.737.

Dauksis argued that the tortfeasor could not have availed himself of the threshold defense from section 627.737 because he did not have the required security necessary to claim tort exemption. The tortfeasor in this case was uninsured and it

seems impossible for any uninsured motorist to have the requisite security, which entails the minimum insurance coverage provided in sections 627.730-627.7405. Yet the supreme court has held the public policy of this state to be that every insured is entitled to recover for the damages he or she would have been able to recover if the offending motorist had maintained a policy of liability insurance. Carguillo v. State Farm Auto. Ins. Co., 529 So.2d 276 (Fla. 1988) (citing Mullis v. State Farm Mut. Ins. Co., 252 So.2d 229 (Fla. 1971)) (emphasis in original).

The supreme court also interpreted the uninsured motorist statute in Dewberry v. Auto Owner's Insurance Co., 363 So.2d 1077 (Fla. 1978). In that case the court held that uninsured motorist coverage is intended to allow the insured the same recovery which would have been available to him had the tortfeasor been insured to the same extent as the insured himself. Id. at 1080. We find Dewberry to be dispositive of the case at bar.

We hold that State Farm was entitled to assert the permanency defense and that the trial court erred in excluding the expert testimony concerning the permanency of Dauksis' injuries. We do not believe that Newton is applicable here because that case seems limited to its specific facts, which involve a non-resident uninsured motorist. However, to the extent that our decision here is contrary to that of the First District Court in Newton, we certify the conflict should this issue be presented to the supreme court for resolution.

We find no error in the remaining issues in the case at bar. As to the questions asked of Dr. Baxt on cross-examination,

the trial court acted within its discretion sustaining the appellant's objection. Any possible error here was harmless. The comments made by counsel for Dauksis at closing were slightly inflammatory in nature; however, there were no contemporaneous objections made by counsel for the appellant. This precludes review on appeal in the absence of fundamental error. Nelson v. Reliance Ins. Co., 368 So.2d 361 (Fla. 4th DCA 1978). We do not agree with the appellant that the comments were of such a nature that neither rebuke nor retraction could destroy their prejudicial and sinister influence. See Sun Supermarkets, Inc. v. Fields, 568 So.2d 480 (Fla. 3d DCA), rev. denied, 581 So.2d 164 (Fla. 1990).

There was no evidence that the jury made any deductions in the amount of its award to the appellee, and the cross appeal is therefore without merit. In light of our decision to reverse on the main appeal, this issue may also be addressed by the trial court on retrial.[1]

We reverse and remand for a new trial and we instruct the trial court to permit expert testimony concerning the permanency of Dauksis' injuries.

DOWNEY and STONE, JJ., concur.

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[1] We again commend to the trial court's consideration the use of an interrogatory form of verdict (i.e., separate blanks for "special damages"), which might avoid such issues arising. See State of Florida, Dep't of Transp. v. Bennett, 17 F.L.W. 207 (Fla. 4th DCA Jan. 8, 1992) (motion for rehearing pending).