IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,662

Florida Bar No: 184170

JOSEPH DAUKSIS, and JANICE DAUKSIS, his wife

Petitioners,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, RAMIRO BENAVIDEZ

Respondents.

FILED
SID J. WHITE
JUN 3 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF RESPONDENT ON MERITS
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

(With Appendix)

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(305) 525-5885 - Broward
(305) 940-7557 - Dade

and

James T. Sparkman, Esquire
BARNETT, CLARK & BARNARD
Fort Lauderdale, FL

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LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

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LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

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REFERENCES:

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

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SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

STATEMENT OF THE FACTS AND CASE

This is an extremely important case which will effect thousands of cases statewide.

What occurred is that the trial judge ruled the no-fault law does not apply to UM claims.

Because this Court has held that an insurer can raise "any" defense that an uninsured motorist could raise, the Fourth District properly refused to eliminate the threshold permanency defense on a claim for personal injuries against the UM carrier.

On June 10, 1988, Dauksis' car was struck from behind by an uninsured motorist. State Farm Mutual Automobile Insurance Company v. Dauksis, 17 FLW D858 (Fla. 4th DCA, April 1, 1992). Dauksis presented a claim for UM benefits to his carrier, State Farm. Dauksis, D858. Dauksis alleged that he had injuries, including a herniated disc while State Farm maintained that his injuries were limited to non-permanent soft tissue damage. Dauksis, D858.

State Farm made two Offers of Judgment, which were not accepted by Dauksis. The case proceeded to trial. During the trial Dauksis moved to preclude State Farm from arguing lack of permanency of his injury. A Motion in Limine was granted and Dauksis did not have to meet Florida's no-fault threshold of permanency to recover damages, as otherwise required by Florida law. Dauksis, D858.

Dauksis based his Motion on the First District's decision in Newton v. Auto-Owners Insurance Company, 560 So.2d 1310 (Fla. 1st

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

DCA), review denied, 574 So.2d 139, and review denied, 574 So.2d 141 (Fla. 1990), which held that a UM carrier could not assert Florida's permanency threshold defense, if the uninsured tortfeasor was a non-resident motorist; in conflict with this Court's holding in Boynton, infra. The uninsured party in this case was a Florida resident.

On appeal, the Fourth District reversed for a new trial, with instructions to the trial court to permit expert testimony concerning whether Dauksis' injuries were permanent or not. Dauksis, D859. The Fourth District distinguished Newton, finding it inapplicable to the facts in Dauksis, because the issue in Newton was whether a Florida insured had to meet the permanency threshold requirements, when the claim was based "upon the alleged negligence of an uninsured, non-resident motorist." Newton, 1311; Dauksis, D858.

The Fourth District went on to discuss at length the legal basis for finding that the permanency defense was available to a UM carrier under several decisions out of this Court. Dauksis, D858-859. Needless to say, State Farm asserted that under this Court's decision in Boynton, it was expressly 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 assert." Allstate Insurance Company v. Boynton, 486 So.2d 552, 557 (Fla. 1986); Dauksis, D858. The Fourth District went on to find that this Court had previously held that, the public policy

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

of the State was 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; citing to Carguillo v. State Farm Mutual Automobile Insurance Company, 529 So.2d 276 (Fla. 1988); Dauksis, D858-859. Therefore, the Fourth District rejected Dauksis' argument that an uninsured tortfeasor could not avail himself of the threshold defense, because he did not have the required security necessary to claim tort exemption. The Fourth District observed that the tortfeasor in the present case was uninsured and it seemed impossible for any uninsured motorist to have the requisite security, which entails the minimum insurance coverage provided in Section 627.730 to Section 627.7405. Dauksis, D858.

The Fourth District expressly held that State Farm was entitled to assert the permanency defense, and it was error to exclude expert testimony concerning whether Dauksis sustained any permanent injury. Dauksis, D858. The Fourth District held that Newton was not applicable, because the case was limited to its specific facts, which involved a non-resident uninsured motorist. However, to the extent that Dauksis conflicted with Newton, the Court certified the question to this Court for resolution. Dauksis, D858.

It is submitted that the decision of the Fourth District is legally correct and that it was erroneous for the trial judge below to rule that Florida's no-fault law did not apply to UM claims; and therefore, the decision in Dauksis must be affirmed.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

SUMMARY OF ARGUMENT

This is an extremely important case which will effect thousands of cases statewide.

What occurred is that the trial judge ruled the no-fault law does not apply to UM claims.

Under §627.727(7) and this Court's decisions, an insurer can raise "any" defense that an uninsured motorist could raise. The Fourth District properly refused to eliminate the threshold permanency defense on a claim for personal injuries against the UM carrier.

It is respectfully submitted, that Dauksis' position is expressly contrary to the public policy of Florida embodied in its insurance laws, and especially the no-fault law, with the express purpose of keeping minor cases with no-permanency out of the litigation system, and thereby reducing the burden on litigation expenses, insurance premiums on the judicial systems.

Even the new arguments made by Dauksis for the first time in this Court are unavailing since the UM and no-fault statutes are very clear. Dauksis has cited many of the cases that are directly on point in favor of State Farm. He has waived any claim that §627.727(7) is unconstitutional. This Court should affirm the well reasoned decision of the Fourth District below, and if necessary, disapprove the decision of the First District in Newton. State Farm Mutual Automobile Insurance Company v. Dauksis, 17 FLW D858 (Fla. 4th DCA, April 1, 1992); Newton v. Auto Owners Insurance Company, 560 So.2d 1310 (Fla. 1st DCA),

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

review denied, 574 So.2d 139 (Fla.), and review denied, 574 So.2d 141 (Fla. 1990).

Dauksis has presented no legal argument or public policy reason for allowing a motorist hit by an uninsured tortfeasor to recover a greater amount of damages, than a motorist hit by an insured tortfeasor. There is no need for the Supreme Court to overrule the clear legislative language and intent in the UM and no-fault laws, or to eliminate the availability of the permanency defense, on a claim for personal injuries against any UM carrier.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

THE FOURTH DISTRICT CORRECTLY HELD THAT FLORIDA'S NO-FAULT LAWS APPLIED TO UNINSURED MOTORIST CLAIMS; AND THAT PURSUANT TO FLORIDA STATUTE, §627.727 AND §627.737, THE UNINSURED MOTORIST CARRIER IS ENTITLED TO ASSERT ALL DEFENSES THAT THE TORTFEASOR COULD ASSERT, WHICH INCLUDES THE PERMANENCY DEFENSE; AND THE FOURTH DISTRICT'S OPINION MUST BE AFFIRMED.

Dauksis' entire Brief is based on a single false legal premise - an uninsured tortfeasor in Florida can never raise the permanency defense. To begin with, no case in Florida has ever held this. This is substantiated by the fact that the only case that Dauksis cites for this proposition is Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974); where this Court held that the very statutes in question were constitutional. Lasky, 13-14. More importantly, no case in Florida has held that Florida's no-fault laws do not apply to accidents involving Florida residents.

In Lasky, this Court held that under §627.733, the legislature provided that an owner of a motor vehicle, as to which security was required, but who did not have such security in effect at the time of the accident, had "no tort immunity, but is personally liable for the payment of benefits under Fla.Stat. §627.736, for personal injury and has all the obligations of an insurer under the no-fault insurance act." Lasky, 13.

If a Florida resident chooses to ignore the financial responsibility laws, and becomes involved in an automobile accident, he has no tort immunity. Therefore, he is liable for the personal injury benefits listed in §627.736, such as medical

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

benefits, lost earnings, etc. If on the other hand, a party does meet the security required and the financial responsibility law, he is immune from suit for these benefits; this is the "tort immunity" referred to in Lasky. In Lasky, this Court held that this trade off or exchange of rights was constitutional.

In exchange for the previous right to damages for pain and suffering; with recovery limited to those situations where the injured party could prove fault on the part of the tortfeasor; the injured party instead is assured of recovery of his major and salient economic losses from his own insurer under the no-fault scheme. Lasky, 14. In other words, the injured party gives up his right to pain and suffering damages, for the assurance that his own insurance company must pay him medical benefits, lost wages, etc., regardless of whether he is at fault, or could prove the fault of the other driver or not.

As pointed out by this Court in Lasky, the protection afforded to the accident victim by the no-fault act, is to speed payment by his own insurer of medical costs, lost wages, etc., while foregoing the right to recover in tort against the tortfeasor for these same benefits and foregoing the right to recover for intangible damages in the absence of permanency. Lasky, 14.

This Court goes on to note that the accident victim is assured of some recovery, even when he himself is at fault. In exchange for the former right to non-economic damages, he receives not only a prompt recovery of his major, salient, out-

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

of-pocket losses - even where he is at fault - but he also receives immunity from being held liable for these same non-economic damages of other parties to the accident. Lasky, 14.

Therefore, as previously stated, there is no case in Florida that holds that an uninsured tortfeasor cannot raise the permanency defense, but rather the case law is quite the opposite. Lasky, supra; Boynton, supra.

The relevant statutes are §627.727(7), §627.733(4), and §627.737(2), which read in pari materia clearly express the legislative intent that pain and suffering damages are limited in motor vehicle accidents to those cases where the injured party proves permanency. Section 627.727(7) expressly states that an UM insurer has no liability for pain and suffering damages, etc., unless the injury is permanent as described in §627.737(2). Section 627.737(2) also states that there will be no recovery for pain and suffering damages in the absence of permanency if the motorist is insured. §627.733(4) states that if no security is provided the car owner receives no "tort immunity" and is liable for the personal injury benefits in §627.736. Therefore, whether the motorist who causes the accident is insured or uninsured, the damages have been limited by these statutes, such that the injured party must prove permanency to recover pain and suffering, mental anguish, etc. Lasky, 14.

This very clear and well established law is what Dauksis is attempting to distinguish through the use of Newton. In fact, what he is arguing is that the permanency defense and the no-

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

fault laws simply do not apply to an uninsured motorist claim. For the following six reasons, the Fourth District's opinion, which is perfectly consistent with this Court's opinions in Boynton and Lasky, has to be affirmed, because clearly it was the legislative intent that the no-fault laws should apply to uninsured motorist claims. Furthermore, Dauksis has given this Court absolutely no legal public policy reason for eliminating uninsured motorist claims from the no-fault statutory scheme. Florida Statute 627.727(7) clearly states that the uninsured motorist carrier is entitled to raise the permanency defense, which is why Dauksis does not even mention this statute until the end of his Brief. If the First District's decision in Newton is interpreted to support Dauksis' position, then Newton must be overruled, as it is in direct and express conflict with the clear and unambiguous language in Florida's no-fault and UM laws, and numerous decisions out of this and other courts.

A. Pursuant to Florida Statute §627.727(7), And The Public Policy Behind Florida's No-Fault Law, State Farm, As The Uninsured Motorist Carrier, Is Entitled To Assert The Threshold Defense And The No-Fault Laws In Florida Were Intended To and Do Apply To Uninsured Motorist Claims.

As previously noted, Dauksis barely mentions Florida Statute §627.727(7), and then belatedly makes a claim that this section is unconstitutional, because this statute expressly states that an uninsured motorist carrier is entitled to the permanency defense. Since the statute is directly on point, and the language in the statute is absolutely clear and unambiguous,

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

there is no other interpretation, other than the fact that State Farm is entitled to raise the statutory permanency defense, as the uninsured motorist carrier. Because the statute is absolutely clear, as is the legislative intent expressed in the statute, Dauksis only makes a new belated claim that the statute is unconstitutional. (Please see subsection F of this Brief for further discussion of case law upholding the constitutionality of this section.)

It is respectfully submitted, that Dauksis' position is expressly contrary to the public policy of Florida embodied in its insurance laws, and especially the no-fault law, with the express purpose of keeping minor cases with no-permanency out of the litigation system, and thereby reducing the burden on litigation expenses, insurance premiums on the judicial systems. The tradeoff is the ability of the accident victim to immediately recover the majority of his medical bills and lost wages directly from the victim's own insurance carrier, without having to prove fault. Therefore, whether the victim is at fault in the accident or not, he is still entitled to recover these PIP benefits.

This is similar to the tradeoff made in worker's compensation cases. When an employee is injured on the job, the employee gives up the right to sue the employer, in exchange for immediate payment of medical bills and compensation for lost wages, through the employer's worker's compensation insurance. The employee forgoes certain elements of damages that he could recover in a standard lawsuit against his employer, for the

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

ability to be quickly compensated for his on-the-job injury, regardless of who is at fault for that injury. The same scheme applies in motor vehicle accidents.

Uninsured motorist coverage is defined in §627.727 and the statutes relevant to this appeal are as follows:

> **627.727. Motor vehicle insurance; uninsured and underinsured vehicle coverage; insolvent insurer protection.**
>
> (1) No motor vehicle liability insurance policy shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto 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, sickness, or disease, including death, resulting therefrom.
>
> . . .
>
> (7) The legal liability of an uninsured motorist coverage insurer shall not include damages in tort for pain, suffering, mental anguish, and inconvenience unless the injury or disease is described in one or more of paragraphs (a) through (d) of s.627.737(2).
>
> **627.733...**
>
> (4) An owner of motor vehicle with respect to which security is required by this section who fails to have such security in effect at the time of an accident shall have no immunity from tort liability, but shall be personally liable for the payment of benefits under s. 627.736. With respect to such benefits, such an owner shall have all of the rights and obligations of an insurer under ss. 627.730-627.7405.
>
> **627.737 Tort exemption; limitation on right to damages; punitive damages.**

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

(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 the benefits described in s. 627.736(1) are payable for such injury, or would be payable but for any exclusion authorized by ss. 627.730-627.7405, under any insurance policy or other method of security complying with the requirements of s. 627.733, or by an owner personally liable under s. 627.733 for the payment of such 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).

(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 the 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 an important bodily function.

(b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.

(c) Significant and permanent scarring or disfigurement.

(d) Death.

It is axiomatic that §627.727(7) and §627.737(2) must be

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

read in pari materia. A UM insurer is not responsible for general damages, unless the plaintiff can establish significant or permanent injuries, i.e. the so called no-fault threshold requirements. If a plaintiff cannot establish the no-fault threshold requirements, then he is barred from recovery from the uninsured motorist carrier.

Florida residents are statutorily obligated to provide security as required by §627.730 to §627.7405. When a Florida resident has the required security he is legally exempt from tort liability or has tort immunity, unless the injured person can prove one of the no-fault threshold injury requirements. Spence v. Hughes, 500 So.2d 538 (Fla. 1987). If a tortfeasor does not have security, then he is subject to a negligence suit and loses his tort immunity for damages because of bodily injury, sickness or disease arising out of the use of a motor vehicle that are recoverable under §627.736. Under §627.733(4), an owner of a motor vehicle who does not have security shall have no immunity from tort liability.

In Newton, the First District held that because the insurance contract itself did not state that the insured/claimant had to meet the permanency threshold, that the carrier was "bound by the language of the contract;" which stated that the insurer would pay for damages for bodily injury sustained by its insured...when the insured is "legally entitled to recover" from the owner or operator of the uninsured motor vehicle. Newton, 1312. As held by the Fourth District, Newton is factually

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

distinguishable from this case, in that the plaintiff in Newton was struck by a non-resident, uninsured tortfeasor from Alabama. Newton argued that he was not required to comply with the no-fault law of this state, §627.737(2), and he did not have to meet the no-fault threshold. Newton admitted that he had not sustained a permanent injury in the accident under §627.737. Newton, 1311.

In Newton, the court noted that the critical question was whether the carriers were bound by the language of their contracts with the Florida insureds, or whether the carriers should be afforded the "exemption from tort liability available under the provisions of §627.727(7) and §627.737(2)." Newton, 1312. In other words, the question was whether the uninsured tortfeasor from Alabama should be afforded Florida's limitation of damages and immunity from tort liability under the Florida statutes. Since the Alabama tortfeasor had not met any of the statutory requirements, and since the Alabama tortfeasor was not foregoing certain elements of damages, in order to be entitled to recover PIP benefits from his own carrier, as Florida residents did, the Newton court simply decided that the out-of-state uninsured motorist should not be given the benefit of tort immunity that inured to Florida residents and he could be sued.

Simply stated, the Alabama tortfeasor had not given up anything in order to be assured the right of immediate payment from his own carrier of PIP benefits, as Florida residents have done. Therefore, there simply was no public policy reason to

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

allow the tort immunity in the Florida statutes to inure to the benefit of the tortfeasor and subsequently the uninsured motorist carrier standing in the shoes of that Alabama tortfeasor.

Apparently, the First District viewed tort immunity and the no-fault permanency defense as one and the same, while the statutes and case law show that they are two separate considerations. Without question, the Alabama tortfeasor in Newton, was not entitled to tort immunity and could be sued by Newton for §627.736 damages. If that tortfeasor was sued, the only legal basis to bar him from claiming the permanency defense was that there was no reason to apply Florida law to allow an out-of-state resident to avoid paying non-economic damages, when he gave up nothing in return for this right/defense.

Unlike Newton, the uninsured tortfeasor in this case was a Florida resident and was required under Florida law to maintain insurance or to provide security under Florida law. He did not do this, so he gave up his statutory right to "tort immunity," and could be sued for §627.736 damages.

As noted by this Court in Boynton, at that point the injured party (Dauksis) had two options: 1) to bring a common law negligence action against the tortfeasor, or; 2) file a claim against his uninsured motorist carrier (State Farm); assuming he had purchased this extra protection. Dauksis chose to go against his own carrier, State Farm, undisputedly subjecting his claim to Florida's UM and no-fault laws. Dauksis collected PIP benefits from State Farm, which were properly set off against his total

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

recovery. Dauksis, D858. This PIP set off would have also been required if he sued the uninsured tortfeasor instead.

As a matter of practicality, the insured injured party sues his UM carrier, since it is highly unlikely that an uninsured motorist would have any assets to recover against, in a negligence suit directly against him. Contrary to what Dauksis asserts, most personal injury lawsuits today are settled without trial; many through mediation and arbitration. Of those remaining cases that do go to trial, a significant percentage are tried because the plaintiff is seeking damages for non-permanent injuries, claiming they are permanent and/or because they have damage claims which are greatly exaggerated and sometimes fabricated. This was one of the very reasons behind requiring a showing of permanency before the plaintiff was entitled to pain and suffering damages in an automobile case. Furthermore, the National Safety Counsel suggests that close to 40% of those driving in Florida are still uninsured. Therefore, the statutory benefits from requiring a plaintiff to prove permanency are still as necessary as ever. Finally, Dauksis promptly received his PIP benefits, without having to show that the other driver was at fault, and would have received them even if he was at fault. This is the benefit he received in exchange for having to prove permanency at trial. Obviously Dauksis was not permanently injured, otherwise, would not be writing these Briefs. He is asking this Court to allow him pain and suffering damages with no permanent injury. Yet, if he was hit by an insured motorist he

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

could not recover these damages. By collecting his no-fault PIP benefits without giving up anything, he is the one having his cake and eating it too.

Even if this Court were to agree with the holding of the First District in Newton, the holding would apply only to cases where the uninsured tortfeasor was a non-resident motorist. The Fourth District correctly rejected Newton as applied to this case, because Newton was restricted to its specific facts and applies only to non-resident uninsured tortfeasors. Dauksis, D859.

Dauksis was wrong in relying on Newton to claim that an insured, making a claim for UM benefits, does not have to prove he has met the Florida threshold requirements of §627.737(2); where Newton did not hold this and §627.727(7) expressly requires that the threshold be met. Meeting the threshold requirement would be the only way an injured person in Florida could be legally entitled to recover damages from the tortfeasor. Florida Statute §627.727(1).

In order to show that the reasoning in Newton does not comport with case law and statutory law of Florida, and that it does not comport even with common sense, we look to the history, implementation and interpretation of the laws which govern this issue.

Florida enacted §627.727, originally §627.0851 (1961), "for the protection of persons insured ... who are legally entitled to recover damages from the owners or operators of uninsured motor

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

vehicles because of bodily injury, sickness or disease, including death, resulting therefrom."

The purpose of UM coverage is to guarantee a minimum payment to those persons who are injured, by persons who failed to meet their financial responsibility. The Florida Legislature enacted §324, Financial Responsibility, "to promote, and provide financial security by such owners and operators whose responsibility it is to recompense others for injury to person or property caused by the operation of a motor vehicle." Fla. Stat. §324.011 (1955). Thus, when a tortious motorist is uninsured, an injured party who carries UM coverage, is protected from damages caused by negligence of the uninsured motorist, who failed to meet his financial responsibility, with the uninsured motorist ultimately remaining liable.

"The purpose of Florida Automobile Reparations Reform Act, [Fla. Stat. §627.730 et. seq.] is to require medical, disability, and funeral insurance benefits to be provided <u>without regard to fault</u> under policies which provide bodily injury and property damage liability insurance ... and to <u>limit</u> the right to claim damages for pain, suffering, mental anguish and inconvenience following the occurrence of a motor vehicle accident." 31 Fla. Jur.2d, Insurance, §77.

In 1976, the Florida Legislature amended §627.736 to require every owner or registrant of a motor vehicle to maintain personal injury protection (PIP) benefits under his policy of insurance. Such PIP coverage covers medical bills, disability benefits and

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

allotted funeral expenses for any person covered under the policy and injured in an automobile accident arising out of the ownership, maintenance or use of the vehicle. The legislature determined that these benefits will be paid regardless of who was at fault and "[a]n injured party who is entitled to bring suit...shall have no right to recover any damages for which [PIP] benefits are paid or payable." Fla. Stat. §627.736(3).

It was the legislature's intent in enacting the above laws that: (1) Medical benefits would be paid by the injured party's insurance carrier regardless of who was at fault in the accident; (2) any tortfeasor would be liable for non-economic damages when permanent injury was sustained as a result of an injury arising out of the ownership, maintenance or use of a vehicle; and, (3) UM coverage would pay for the damage, which the injured insured would legally be entitled to recover from the tortfeasor, as if the tortfeasor were financially responsible and properly insured pursuant to Florida law.

As the Fourth District pointed out in Dauksis, this Court in Boynton, expressly held that under §627.727(1), the uninsured motorist carrier stands in the same shoes as the uninsured motorist, "and can raise and assert any defense that the uninsured motorist could raise." Boynton, 557. In response to Dauksis' claim that permanency could not be raised by the tortfeasor because the tortfeasor was not allowed to raise this defense because he had not maintained the required security, the Fourth District noted that it was highly unlikely that any

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

uninsured motorist would maintain required security. Dauksis, D858. More importantly, the court relied on this Court's stated public policy of Florida, which was 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." Dauksis, D858, citing, Carquillo v. State Farm Automobile Insurance Company, 529 So.2d 274, 276 (Fla. 1988); citing, Mullis v. State Farm Mutual Automobile Insurance Company, 252 So.2d 229 (Fla. 1971). Therefore, this Court itself has stated that the uninsured motorist is to be treated as if he maintained a policy of liability insurance, and the plaintiff is entitled to recover damages accordingly.

Dauksis does not challenge the fact that an insured motorist clearly can raise the permanency defense. Therefore, if the tortfeasor is to be treated the same way as an insured motorist, clearly the tortfeasor can also raise the permanency defense as the Fourth District correctly held. The same legal finding was the basis of the Fourth District's reversal in Dauksis for a new trial, requiring the Plaintiff to show permanency, expressly relying on this Court's decision in Dewberry v. Auto Owner's Insurance Company, 363 So.2d 1077 (Fla. 1978). In Dewberry, this Court held that uninsured motorist coverage was 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. Dewberry, 1080; Dauksis, D859. The Fourth District found Dewberry dispositive and reversed for new trial,

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

with State Farm being allowed to raise the permanency defense as the uninsured motorist carrier. This was the correct legal result under this Court's cases interpreting Florida's no-fault and uninsured motorist coverage statutes. Dauksis has given this Court no reason to deviate from this long line of established case law, other than his complaint that he is entitled to recover more damages, because the person who hit his car was uninsured, then he would be entitled to recover if the person who hit his car was insured.

Finally, in Newton, the court found that its opinion was aligned with this Court's opinion in Boynton, because there would be no subrogation problem or prejudice to the uninsured motorist carrier if it were required to pay the claims of their insureds. Newton, 1312. However, Florida law requires that the tortfeasor be treated as if he is insured. This very well could mean that State Farm would not be entitled to recover damages awarded for pain and suffering, etc. for a non-permanent injury against the tortfeasor, since State Farm would not be able to recover these damages if the tortfeasor were insured. This clearly would be prejudicial to the carrier, and of course would result in uninsured tortfeasors being treated differently than insured tortfeasors. In fact, it would lead to the irrational result of a plaintiff being able to recover more against an uninsured tortfeasor, than he could recover against an insured tortfeasor. Since the claims are almost always made against the UM carrier this would also certainly result in an increase in premiums where

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

the UM carrier would be paying out more in damages, than an insurer would pay if the claimant was hit by an insured motorist.

Mr. Dauksis paid a premium for uninsured motorist coverage, which his carrier was required to give him pursuant to Florida law. The carrier paid Dauksis the benefits he was entitled to under the statute. Dauksis is not being penalized because he had full coverage. He paid an additional premium to obtain uninsured motorist coverage and he received uninsured motorist coverage. State Farm paid Dauksis his PIP benefits and would have paid him the same benefits, even if he had been at fault in the accident. For the ability to promptly collect these PIP benefits, State Farm was entitled to assert the permanency defense as would any tortfeasor in the State of Florida. There is simply no public policy reason to change this result. Furthermore, Florida statutes are absolutely clear and unequivocal that the uninsured motorist carrier is entitled to the permanency defense and therefore, the decision in Dauksis below must be affirmed.

B. Florida Statute §627.727(7) Expressly Requires The Application Of The Threshold Defense In A Suit Against A UM Carrier.

Apparently, in subheading B, Dauksis is arguing that when a claim is made against a UM carrier, the no-fault threshold defense does not apply, even if the tortfeasor has PIP coverage. Dauksis states that the PIP benefits described in the no-fault statute do not include the benefit of tort immunity, which he claims is only available to those who have purchased the "minimum insurance requirements." His somewhat convoluted argument seems

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

to be that unless the tortfeasor has liability coverage, he is not allowed to assert either tort immunity or the no-fault threshold defense. Dauksis is simply wrong in what he is attempting to argue in Subheading B. Spence, supra, 539-540 (we agree with the District Court that the tort exemption applies not only to those individuals required by statute to provide PIP coverage but to every individual [resident or non-resident] who actually provides PIP coverage conforming to the no-fault laws); Norquoy v. Metcalf, 575 So.2d 322 (Fla. 4th DCA 1991)(bicyclist injured when he was hit by an automobile and paid PIP damages by the tortfeasor's carrier, entitled tortfeasor to raise the permanency defense; reversing the error committed by the trial court's ruling that the PIP threshold requirements were inapplicable to the plaintiff.) There is no question that "tort immunity" was expressly intended as a benefit in exchange for personal injury protection coverage and is available to the insured whether the insured is at fault or not. Similarly, tort immunity from a negligence action for these PIP benefits inures to every tortfeasor, as long as the tortfeasor meets the statutory minimum financial responsibility requirements. There is nothing in Dauksis that conflicts with this case law or legal principles.

Regarding the Fourth District's reliance on Dewberry, suffice it to say that UM coverage fills in the deficiency in the tortfeasor's insurance coverage, because the insured accident victim has already recovered PIP benefits from his own carrier,

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

and any deficiency in PIP benefits is recoverable, even in the absence of a permanent injury. In the routine situation, the injured party sues either the insured tortfeasor, or his uninsured motorist carrier, and the jury awards all damages to the plaintiff that he incurred as a result of the accident. After the verdict is rendered, the trial judge then grants a set off for those PIP benefits already paid and this scenario is not changed if the plaintiff decides to sue the tortfeasor instead of his UM carrier. More importantly, the scenario is not changed in any way by the fact that regardless of who the plaintiff chooses to sue, the defendant is still entitled to raise the permanency threshold defense; regardless of whether the defendant is the insured tortfeasor, the uninsured tortfeasor or the uninsured motorist carrier. The Plaintiff, Dauksis, argues nothing in subheading B that requires reversal of the opinion below, which must be affirmed.

C. The History Behind The UM Statute Provides For Both Tort Immunity And The Application Of The Threshold Defense.

The Fourth District correctly interpreted Florida Statute §627.727 and §627.737, because the sole purpose of uninsured motorist coverage is to enable recovery within statutory limits of the compensation, which would have been available if the tortfeasor had been insured. Therefore, the same defenses are available to the tortfeasor and equally available to the UM carrier standing in the tortfeasor's place.

In Boynton, this Court discusses at length the development

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

of uninsured motorist coverage and the public policy behind it. This Court adopted the rationale of the underlying Fifth District opinion and its reliance on Winner v. Ratzlaff, 211 Kan. 59, 505 P.2d 606 (1973), and the comments in A. Widiss, A Guide to Uninsured Motorist Coverage, §1.9 (1969). Boynton, 556-557. In describing the development and public policy behind uninsured motorist coverage, this Court stated:

> The Winner court looked to the cogent observations of a commentator on UM law in reaching its conclusion. His explanation of the origins of UM coverage sheds light on the problem before us.
>
> > The antecedent of the uninsured motorist endorsement ... can be found in the unsatisfied judgment insurance first offered in about 1925 by the Utilities Indemnity Exchange. This insurance provided indemnification when the insured showed both (1) that he had reduced a claim to judgment and (2) that he was unable to collect the judgment from the negligent party. Such insurance was available from several companies during the years from 1925 until 1956. When the uninsured motorist coverage became generally available, the unsatisfied judgment insurance was abandoned. It should be noted that the uninsured motorist endorsement - as proposed and subsequently issued - different significantly from its predecessor in that it eliminated the requirement that the insured obtain a judgment against the uninsured motorist prior to recovering under his policy. A. Widiss, A Guide to Uninsured Motorist Coverage, §1.9 (1969) (emphasis added) (hereinafter cited as Widiss).

Uninsured motorist coverage therefore arose

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

> 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. UM 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 interest of the tortfeasor and the insurer may not necessarily coincide.
>
> Boynton, 556-557.

Again, relying on Widiss, this Court noted that it is unlikely that insurance companies would give up substantive defenses to achieve the ultimate goal of protecting motorist against financially irresponsible tortfeasors:

> Indeed, Widiss notes that "[t]he insurance industry conceived and developed the uninsured motorist endorsement in an attempt to forestall the enactment of state legislation directed at either creating compulsory insurance requirements or otherwise altering the character of the then-existing insurance market in order to deal with the hazard created by ["financially irresponsible] uninsured motorists." Widiss at §1.12. It seems unlikely that the companies would deliberately relinquish valid substantive defenses when it was wholly unnecessary to do so to achieve the goal of protecting against financially irresponsible motorists. Widiss also observes that in most states where UM coverage has been made mandatory subsequent to its development, the legislation has merely required a UM endorsement. While Florida's section 627.727 does go into some detail regarding UM coverage, the first sentence of the statute, containing the language at issue here merely defines UM coverage in terms sufficient to identify it as such. This does not suggest any legislative intent to expand UM coverage beyond that contemplated by the insurance-industry-developed endorsement.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

Boynton, 557.

In describing Florida's uninsured motorist scheme, the Court noted that this is limited protection in the form of third party coverage, wherein the carrier effectively stands in the shoes of the uninsured motorist and can assert any defense the uninsured motorist can assert:

> The legislature widely 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 UM coverage in an amount equal to the policyholder's 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 injured." §627.727(1). The UM 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. It is not first party coverage even though 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 UM coverage, the carrier pays only if the tortfeasor would have to pay, if the claim were made directly against the tortfeasor.
>
> One involved in an accident with an uninsured motorist can bring a common law action against the uninsured motorist, if he so desires. The uninsured motorist can of course defend and interpose any defense available to him at law including contributory negligence and the exclusiveness

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

> of worker's compensation. If the injured party recovers a judgment, he may endeavor to satisfy his judgment from the tortfeasor's assets. However, the insured motorist may opt to make claim against his UM carrier instead of suing the tortfeasor. In so doing he has a policy prerequisite, namely, proof that the tortfeasor is uninsured. The tortfeasor may be financially responsible, but is he is without insurance or has not complied with the self-insurance provisions of the statutes, the injured party may make claim against his UM carrier. The insurer is subrogated to any sum that it pays the policyholder under the UM coverage and may bring suit against the uninsured motorist to recover all sums it has paid its insured under the UM policy. The subrogation right would be frustrated if the insurer were forced to pay claims when it would be barred by a substantive defense from winning a judgment against a tortfeasor.
>
> Boynton, 557-558.

Therefore, the First District's decision in Newton, if it is construed as Dauksis suggests, to take all uninsured motorist claims out of the no-fault laws, and eliminate the permanency defense, is in direct and express conflict with the law in the State of Florida. The law is clearly and concisely and correctly stated in Boynton. In deciding Newton, the First District incorrectly cited Boynton for the proposition that the insurer is liable to pay damages under a UM policy, even though the appellants admitted that they had not sustained a permanent injury. Newton, 1312. It is clear from Boynton, that not only is the threshold injury one of the defenses compatible to the statute, but such defense would have been available to the uninsured motorist as well. Boynton, 256. Therefore, where this Court has held that an insurer could raise any defense, and

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

§627.727(7) specifically states that the claimant must prove permanency and that the UM carrier is entitled to raise the no-fault threshold, Newton is in direct and express conflict with these laws and Newton cannot and should not be used to limit an insurer's valid defenses, such as lack of permanent injury. Therefore, Newton was correctly rejected by the Fourth District, even if Newton stands for the propositions that Dauksis claims that it does.

The court in Newton was incorrect when it cited this Court's decision in Boynton for the proposition that 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. Newton, 1312. Of course, Dauksis makes the same arguments, since Newton is the only case even arguably in his favor. However, this Court was unequivocal in Boynton, when it noted that the UM coverage was limited third party coverage, and not first party coverage, even though the policyholder pays for it. Boynton, 557. Furthermore, this Court in line with §627.727(7) stated that UM coverage applies only if the tortfeasor would have to pay, as if the claim were made directly against the tortfeasor. Boynton, 557. As previously discussed in subsection A, the tortfeasor is entitled to raise the no-fault permanency threshold defense, and of course, the UM carrier is entitled to do so, not only because the tortfeasor can raise this defense, but because §627.727(7) expressly says this.

Therefore, Dauksis' attempt to distinguish Boynton based on

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

the fact that the statutory defenses asserted in that case was worker's compensation immunity is to no avail. As previously mentioned, of course, Dauksis completely ignores §627.727(7) in his discussion of Boynton, and continues on with his argument that all the public policy behind the uninsured motorist coverage statutes was not really ever intended to apply to an "uninsured" motorist. Rather, he claims, only insured motorists are entitled to the threshold defense, even though this is contrary to the express language in §627.727(7).

He also totally ignores the public policy reason by having a threshold defense, such as keeping minor cases with no permanency out of the litigation system. As correctly observed by this Court in Boynton, most claims against the injured party's UM carrier are settled in arbitration and therefore, ease the burden on the judicial system, and keep insurance premiums from spirally out of control. Boynton, 557. Finally, State Farm is not asserting more defenses than the tortfeasor would have been entitled to assert, because Dauksis is simply wrong that the tortfeasor could not assert the no-fault threshold defense. Once again, of course this argument totally ignores Florida Statute §627.727(7), and all the case law interpreting the UM statute, which holds that the injured party is entitled to recover against his UM carrier, as standing in the shoes of the tortfeasor, "as if the tortfeasor were insured." Therefore, under both public policy, as stated in this Court's decision in Boynton and Florida law, the Dauksis opinion below must be affirmed and any conflict

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

existing between Newton and Boynton, resolved in favor of this Court's decision in Boynton.

D. Newton Can Only Be Good Law If §627.727(7) Is Not Applied.

Section 627.727(7) expressly states that a UM carrier in Florida is entitled to assert the permanency defense. The only possible way that Newton can be upheld in light of this statute, is if the First District decided not to apply the statute because the tortfeasor in Newton was a non-resident of Florida. In other words, if the tortfeasor were a resident of Florida, §627.727(7) would expressly allow the UM carrier to raise the permanency defense. Newton cites this section of the statute, but does not discuss it at all. Therefore, we are left to infer what the First District had in mind when it held that Newton's UM carrier was not entitled to the permanency defense.

To begin with, Dauksis of course is wrong when he claims that Newton has nothing to do with the fact that the tortfeasor was a non-resident uninsured motorist. The court expressly said that the issue presented to it is whether a Florida insured must meet the threshold requirements of §627.727(2) "when the claim is based upon the alleged negligence of an uninsured, non-resident motorist..." Newton, 1311. Later the court finds the critical question is whether the insurance carrier should be bound by the language of its contract with its insured, or whether it should be afforded exemption from tort liability available under the provisions of §627.727(7) and §627.737(2). Newton, 1312. In order to avoid the application of §627.727(7), which expressly

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

entitles the UM carrier to raise the permanency defense, the court would have to find for some reason the statute did not apply. The only way the First District could not apply §627.727(7), would be if it found that the non-resident uninsured tortfeasor would not be entitled to tort immunity and the limitation on damages, because he was not a resident of Florida. If he were a resident of Florida, of course the statute would have to be applied, and the UM carrier would clearly be entitled to raise the permanency defense.

There is no question that an insurance policy issued in Florida is subject to the Florida's no-fault and uninsured motorist statutes, especially where the statutes compel the insurer to offer uninsured motorist coverage. The only way these statutes can be ignored is if one is dealing with a non-resident motorist. Implicit in Newton is the finding that the non-resident tortfeasor was not allowed the benefit of either tort immunity, because he had no insurance whatsoever, or the threshold defense, because §627.727(7) only applies to Florida residents. Clearly if the tortfeasor, as in Spence, decides to comply with Florida statutes, and meets the Florida public policy which entitles him to tort immunity, i.e. having PIP coverage, then he is treated as any other Florida resident. He is immune from a negligence suit for those first party PIP benefits, but is still subject to suit for those damages stemming from a permanent injury.

The lengthy discussion under subsection D by Dauksis, of the

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

Newton decision, is premised on: 1) totally ignoring §627.727(7) and 2) Dauksis' unsubstantiated claim that no tortfeasor, resident or not, can raise the threshold defense. Of course, we cannot simply ignore the statute, especially in this case, involving a Florida tortfeasor, a Florida claimant, and a Florida accident. Dauksis has cited no authority for his self-serving conclusion that no tortfeasor in Florida who is uninsured is entitled to raise the permanency defense.

Dauksis does not mention that adopting his position leads to discrimination against Florida insured tortfeasors. If this Court adopts Dauksis' rationale, an injured party who is hit by an uninsured motorist in Florida can recover a greater amount of damages, than if that same injured party is hit by an insured motorist in Florida. Dauksis again wants to recover pain and suffering, mental anguish, etc., without having to prove permanency, based solely on the fact that he was hit by an uninsured motorist. He concedes that if he was hit by an insured motorist, he could not recover these damages. He does not address in any manner, why this disparate treatment is alright and should be the new law in Florida.

Dauksis only vaguely asserts that he should be allowed to recover without permanency, because State Farm did not tell him that it would rely on a permanency defense. Of course State Farm's policy did tell him that it would pay uninsured motorist benefits for any damages which he was "legally entitled to collect" from an uninsured motorist. Florida Statute

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

§627.727(7), which is incorporated in every uninsured motorist policy in Florida, since all of these policies are subject to Florida law, clearly states that the carrier can assert the threshold defense. Therefore, this could not come as any surprise to Dauksis. Moreover, Florida law has consistently upheld the UM carrier's right to assert any defense that the tortfeasor could assert, and in the UM situation, the tortfeasor is treated as if he had insurance coverage. Therefore, this attempt to uphold Newton and overturn Dauksis is without merit, and of course is contrary to the express legislative intent in §627.727(7).

There is no question that if Newton is based on the fact that the First District simply decided that it did not have to apply §627.727(7), then of course this Court must overrule it. If on the other hand, Newton is simply a ruling that the First District refused to allow the uninsured Alabama tortfeasor the benefits of Florida law, where he did not give up certain elements of damages in order to collect PIP benefits like the Florida residents have done, then in fact, the Fourth District was correct that Newton is distinguishable on its facts. The bottom line however, is that Florida Statute §627.727(7) applies to all Florida uninsured motorist policies and must be given effect and requires affirmance of the Dauksis decision below.

E. All Uninsured Motorist Policies In Florida Incorporate All Florida Statutory Provisions Which Are Part Of The Contract.

Contrary to what Dauksis asserts, the interpretation of

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

State Farm's policy language is not at all at issue. As previously noted, the only reason that Newton could have possibly looked to the insurance language in that case, was because the court decided not to apply §627.727(7) and §627.733(4), which entitles the uninsured motorist carrier to assert the permanency defense. It is important to remember that insurance carriers doing business in Florida are required by statute to offer uninsured motorist insurance, and must provide this coverage unless it is expressly rejected by the insured. It has always been the law in Florida that when an insurance contract is required by statute, the parties to the contract are presumed to have adopted the statutory provisions and those provisions become part of the contract. National Merchandise Co., Inc. v. United Service Automobile Association, 400 So.2d 526, 531 (Fla. 1st DCA 1981)(a statute applicable to the insurance policy, which was enforced at the time the policy of insurance was consummated, is considered a basic ingredient of the contract, because the law in existence at the time of the making of the contract of insurance forms a part of that contract, as if it were expressly referred to in its terms); Standard Accident Insurance Company v. Gavin, 184 So.2d 229 (Fla. 1st DCA 1966)(parties who enter into insurance contract on a matter surrounded by statutory limitations and requirements are presumed to have entered into the agreement with reference to those statutes and such statutory provisions become a part of the contract); Williams v. New England Mutual Life Insurance Company, 419 So.2d 766 (Fla. 1st

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

DCA 1982); Standard Marine Insurance Company v. Allyn, 333 So.2d 497 (Fla. 1st DCA 1976).

In fact, there is no question that when State Farm issued its policy to Dauksis it relied on the uninsured motorist and no-fault statutes as well as its right to assert the threshold defense, when it paid out benefits to Dauksis, as it was standing in the shoes of the tortfeasor. Therefore, Dauksis is simply wrong when he claims that he paid a premium and somehow had been cheated because his carrier is entitled to raise the statutory defense of permanency. As previously discussed at length, Dauksis' inability to collect pain and suffering damages for a non-permanent injury were given up in exchange for his right to collect PIP benefits, whether he was at fault or not.

The discussion in Newton is totally irrelevant regarding the application of the insurance contract language, where instead the statutes clearly control. This is not changed by the single case that Dauksis cites in support of his position; State Farm Mutual Automobile Insurance Company v. Mallard, 548 So.2d 733 (Fla. 3d DCA 1989). Mallard simply holds that where an insurance policy amplifies, extends, or modifies, statutory minimum coverage, greater reliance is given on those provisions which result in greater indemnity. Mallard, 735. There is nothing in Mallard that states that the entire statutory scheme for uninsured motorist coverage and no-fault can be completely ignored, simply because the State Farm policy does not expressly list these statutes, or the no-fault threshold defense. As previously

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

noted, these statutes are presumed to be part of the contract that Dauksis entered into when he purchased his policy from State Farm, as a matter of law.

Furthermore, as this Court held in Dewberry, any deviation in the recovery by an insured from his UM carrier, from recovery by an insured from the tortfeasor directly, would "place the insured who is injured by an uninsured motorist in a better position than one who is harmed by a motorist having the same insurance as the insured." Dewberry, supra. To adopt Dauksis' line of reasoning, and to ignore the fact that the Florida statutes are incorporated in State Farm's policy, results in disparate treatment, as those motorists hit by uninsured tortfeasors receive a greater amount of damages than those who are unfortunate to be hit by an insured Florida motorist. Dauksis cites no case law whatsoever, to uphold this unequal application of Florida law.

According to Dauksis, the State Farm policy language controls whether or not the UM carrier can invoke the no-fault threshold defense. Of course, his underlying premise is that the tortfeasor cannot invoke the threshold defense, which is simply incorrect. But even assuming arguendo that Dauksis is correct about this, Fla. Stat. §627.727(7) clearly allows the carrier to assert the threshold defense. The question in this case is the interpretation of Florida statutes, not the State Farm insurance policy. This Court specifically held in Boynton, that a UM insurer can raise and assert any defense the uninsured motorist

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

could assert. There is no question that the uninsured tortfeasor is treated as if he had insurance. So no matter how you look at it, the tortfeasor is entitled to raise the uninsured motorist defense, plus of course the statute expressly allows the carrier to do so. As these statutes are all part of State Farm's policy as a matter of law, they simply cannot be ignored as they were in Newton, or as Dauksis would like.

The State Farm policy does not provide more benefits or broader coverage than does the statute. In fact, the policy specifically says that it will pay those damages that Dauksis is "legally entitled to collect" from an uninsured motorist. In this case, Dauksis can only collect pain and suffering damages if he proves permanency.

Furthermore, it is important to remember the upshot of Dauksis' position, is that his carrier cannot assert the threshold defense, as the tortfeasor could not assert threshold defense. If the tortfeasor can assert the threshold defense, Dauksis has to lose because otherwise State Farm's rights of subrogation would be impaired if State Farm could not assert the defense, but the tortfeasor could. Boynton, 558.

Finally, Dauksis insists that §627.727(7) is irrelevant and that the policy language must be strictly construed against State Farm. However, even construing the policy language strictly, only requires that State Farm pay those damages that Dauksis is legally entitled to collect from the uninsured motorist, assuming Dauksis proves permanent injury. Of course, this is exactly what

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

§627.727(7) requires also. This statute is part of State Farm's policy, as a matter of law, a point which apparently Dauksis refuses to recognize. Because the statutes are incorporated in the policy, as a matter of law, there is no need for the policy to list the statutes. Because the insured is on notice of the existence of these laws, as is the carrier, these laws become part of the contract at the time it is consummated.

The bottom line to all of this is simply that this Court does not even need to look at the State Farm policy because the statutes clearly set forth what can be recovered against an uninsured motorist carrier, and these statutes must be applied as they are clear and unambiguous. Therefore, the Fourth District's decision below must be affirmed, as a matter of law.

F. Constitutional Challenge Waived.

For the first time ever, Dauksis raises in this Court a challenge to Fla. Stat. §627.727(7) as applied to the facts of this case. As this Court is well aware, a constitutional challenge to a statute cannot be raised for the first time on appeal, especially when it is not raised in the trial court and not even in the Fourth District. Therefore, Dauksis has waived any argument that §627.727(7) is unconstitutional, as applied to the facts of this case.

It is a fundamental rule of appellate review, that an appellate court sits only to review rulings actually made by the trial courts which it supervises, and it cannot entertain a legal issue raised for the first time on appeal. Dober v. Worrell, 401

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

So.2d 1322 (Fla. 1981); Bonded Transportation, Inc. v. Lee, 336 So.2d 1132 (Fla. 1976).

A similar rule applies to asserting grounds challenging the constitutionality of a statute, which grounds not raised in the trial court ordinarily cannot be considered on appeal. Smith v. Ervin, 64 So.2d 166 (Fla. 1953); Henderson v. Antonacci, 62 So.2d 5 (Fla. 1952). As this Court has stated, the constitutional application of a statute to a particular set of facts must be raised at the trial level. Trushin v. State, 425 So.2d 1126, 1129-1130 (Fla. 1982). In his Brief at page 27, Dauksis argues that §627.727(7) is unconstitutional as it relates to the issues in this case, arguing that it is unconstitutional as applied to the facts. Therefore, Dauksis has waived this argument by failing to raise it in the trial court.

It is well settled that even constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court. Clark v. State, 363 So.2d 331, 333 (Fla. 1978). Therefore, where the constitutionality of this statute was never raised in the trial court or the Fourth District, Dauksis is barred from raising it now in the Supreme Court.

Even if Dauksis was entitled to attack the constitutionality of the statute as applied, there is nothing unconstitutional in the statute. Dauksis puts great emphasis on Lasky, which upheld the majority of the provisions of the uninsured motorist scheme in Florida. Lasky, supra. In one breath, Dauksis concedes that

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

the purpose of the UM statute is to allow recovery by the insured to the same extent as if the tortfeasor had carried liability insurance, and then he turns around and states that it is improper for the UM carrier standing in the shoes of the tortfeasor to assert the permanency defense. In other words, he recognizes that the tortfeasor has to be treated as if he were injured, which means of course that the tortfeasor can assert the no-fault defense. If we treat the tortfeasor as if he carried the required security, he is entitled to assert the defense. There cannot be, and is in fact, no different between the express purpose of the UM statute and §627.727(7); which is the codification of the same principle that the UM carrier, standing in the shoes of the tortfeasor, is treated as if the tortfeasor had insurance and therefore can assert the threshold defense.

There is nothing unreasonable or improper about the legislature limiting the damages available under the no-fault and uninsured motorist scheme. Dauksis simply wants this Court to ignore §627.727(7), since it is totally dispositive of the issue on appeal, claiming at this late stage of the game, that it is unconstitutional, but has really showed nothing to support this contention. Fla. Stat. §627.727(7) is a codification of all the cases cited regarding the public policy behind uninsured motorist coverage such as Lasky and Boynton. Therefore, it certainly bears a reasonable relationship to the public policy behind the uninsured motorist provisions. Dauksis completely ignores the fact that UM coverage is limited third party benefits available

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

to insureds in Florida, and that one of the purposes of the UM statute, the no-fault law and the permanency defense was to keep minor cases with no permanency out of the litigation system and thus, reduce the burden on litigation expenses, insurance premiums, and on the judicial system. Clearly, any statute that upholds this purpose has a reasonable relationship to the overall uninsured motorist scheme, which is to treat the tortfeasor as if he was insured, and to limit the recovery to those pain and suffering damages resulting from a permanent injury, regardless of whether the tortfeasor was insured or uninsured. Therefore, even if the issue was not waived, §627.727(7) is not unconstitutional as applied to the facts in this case.

It is important to remember that this Court is obliged to construe statutes in such a way as to render them constitutional, if there is any reasonable basis for doing do. Aldana v. Holub, 381 So.2d 231 (Fla. 1980); VanBibber v. Hartford Accident & Indemnity Insurance Company, 439 So.2d 880 (Fla. 1983). Just as the courts have placed limitations on the dangerous instrumentality doctrine without completely abolishing it, and the legislature has placed limits on car owners' vicarious liability for the acts of the operators beyond their control in certain circumstances, the legislature can limit the damages recovered in motor vehicle accidents. The elimination of one possible ground for relief does not require the legislature to provide some replacement. Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981). In Jetton, this

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

Court upheld the constitutionality of the waiver of sovereign immunity cap at $50,000, stating that the constitution does not require a substitute remedy, unless the legislative action has abolished or totally eliminated the previously recognized cause of action. Jetton, 398.

> As discussed in Kluger and born out in later decisions, not substitute remedy need be supplied by legislation which reduces but does not destroy a cause of action. The Court pointed out that the legislative changes in the standard of care required, making recovery for negligence more difficult, impeded but do not bar recovery, and so are not constitutionally suspect.
>
> Jetton, 398, citing, Kluger v. White, 281 So.2d 1, 4 (Fla. 1973).

For a statute to withstand constitutional scrutiny under principles of substantive due process, which apparently is Dauksis' complaint, it need merely be rationally related to the achievement of a legitimate legislative purpose. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983). Dauksis makes the self-serving and completely unsubstantiated claim that §627.727(7) does not meet this reasonable standard, because the State Farm policy has the provision allowing arbitration or trial (Brief of Petitioner, p. 31-32). Dauksis also makes the self-serving claim that an insurance company invariably chooses trial, rather than arbitration; which is contrary to the experience of not only undersigned counsel, but the general trial bar in Florida. Insurance companies are often forced into trial in a UM situation in situations like the one involving Dauksis, where he is

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

attempting to turn his non-permanent injury into a permanent injury recovery, and therefore collect damages he would not otherwise be entitled to. Therefore, the provisions of §627.727(7) are constitutional, as Dauksis concedes when he states in his Brief that the uninsured motorist provision is reasonably related to the "idea of uninsured motorist coverage." Furthermore, Dauksis cites no case that holds a statute can be constitutional when it is passed and then loses it constitutionality based upon unsubstantiated assertions that the public policy behind the statute no longer exists.

However, this Court does not have to engage a due process analysis of the statute, as the claim that it is unconstitutional, as applied, was never raised in the trial court and was not even hinted at in the Fourth District, and therefore, the issue has been waived on appeal.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

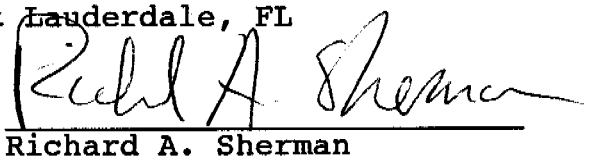
CONCLUSION

The Fourth District correctly relied on this Court's decision in Dewberry and Boynton, to hold that the uninsured motorist carrier is entitled to assert the permanency defense; which is consistent with statute §627.727(7), which is constitutional; and, therefore the opinion below must be affirmed.

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(305) 525-5885 - Broward
(305) 940-7557 - Dade

and

James T. Sparkman, Esquire
BARNETT, CLARK & BARNARD
Fort Lauderdale, FL

By: 
Richard A. Sherman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of June, 1992 to:

James T. Sparkman, Esquire
Barnett, Clark & Barnard
110 S.E. 6th Street
Suite 1800 - 110 Tower
Fort Lauderdale, FL 33301

Stephen J. Cohen, Esquire
Jacobson, Cohen & Cohen, P.A.
800 N.W. 62nd Street
Suite 200
Fort Lauderdale, FL 33309

Jeffrey H. Wolfson, Esquire
644 S.E. 5th Avenue
Fort Lauderdale, FL 33301

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(305) 525-5885 - Broward
(305) 940-7557 - Dade

and

James T. Sparkman, Esquire
BARNETT, CLARK & BARNARD
Fort Lauderdale, FL

By: Richard A. Sherman
Richard A. Sherman