SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO.: 94-1140

85,946

JEFFREY L. HANNAH

Petitioner,

v.

VERONICA NEWKIRK,

Respondent.

ON QUESTION CERTIFIED BY THE FOURTH DISTRICT COURT OF APPEAL AS ONE OF GREAT PUBLIC IMPORTANCE

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Respondent hereby certify that the following persons and entities have or may have an interest in the outcome of this case:

1. Steven W. Ainbinder (trial counsel for Respondent)
2. James K. Clark (former appellate counsel for Respondent)
3. Frances F. Guasch (former appellate counsel for Respondent)
4. James T. Sparkman (appellate counsel for Respondent)
5. John W. Reis (appellate counsel for Respondent)
6. W. George Allen (counsel for Petitioner)
7. Virginia D. Stow (counsel for Petitioner)
8. Veronica Newkirk (Respondent)
9. Jeffrey L. Hannah (Petitioner)
10. Fidelity and Deposit Company of Maryland (Surety)
11. Government Employees Insurance Company
12. Seitlin & Company Insurance
13. Honorable James M. Reasbeck

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STATEMENT OF THE CASE AND FACTS

Respondent agrees with the statement of the course of proceedings and with most of the statement of facts contained in the Petitioner's Initial Brief on the Merits, which shall be referred to hereinafter as "I.B.," followed by the applicable page number of the Brief. However, Respondent disagrees with that portion of Petitioner's statement of facts which states that the PIP deductible "was never at issue" when counsel for the parties entered into an agreement to reduce the jury award by any and all PIP coverage. (See I.B.3.; emphasis in original.) Petitioner fails to cite to any portion of the record which would support this allegation.

SUMMARY OF THE ARGUMENT

The plain language of § 627.739(1), Florida Statutes (1984), mandates that a trial court set off the amount of the injured party's elected PIP deductible and the amount of benefits paid by a carrier from a verdict against a tortfeasor. Section 627.739(1) specifically states that an insured who opts for a deductible

> shall have no right to claim or recover any amount so deducted from ... any person ... who is made exempt from tort liability.

This language would be nullified and repealed by a holding that the insured may recover the deductible against a tortfeasor.

This Court has held that a jury verdict awarding medical bills for non-permanent damages should be reduced "to the extent of the personal injury protection benefits." Mansfield v. Rivero, 620 So. 987, 989 (Fla. 1993). These benefits include the optional deductible. The insured is benefitted with reduced premiums by selecting the deductible. Allowing the deductible amount to be set off from a jury verdict promotes the purpose of the no-fault scheme in preventing duplicative benefits, reducing litigation, and ensuring reciprocal immunity.

ARGUMENT

SECTION 627.739(1), FLORIDA STATUTES, MANDATES THAT A TRIAL COURT SET OFF THE AMOUNT OF THE INJURED PARTY'S ELECTED PIP DEDUCTIBLE FROM A VERDICT AGAINST A TORTFEASOR

A. The plain language of § 627.739(1) requires the deductible to be set-off from a jury verdict against a tortfeasor.

The plain language of § 627.739(1), Florida Statutes (1984), controls this appeal. Its pertinent provisions provide:

> Any person electing a deductible ... ***shall have no right to claim or recover any amount so deducted*** from any owner, registrant, operator, or occupant of a vehicle ... ***who is made exempt from tort liability*** by ss. 627.730-627.7405.

(emphasis supplied). That the deductible is not recoverable is unequivocal. This Court has long held that "unambiguous statutory language must be accorded its plain meaning." Carson v. Miller, 370 So. 2d 10 (Fla. 1979).

This basic rule of law was followed in Mansfield v. Rivero, 620 So. 2d 987 (Fla. 1993), wherein this Court reversed the Third District for failing to apply the clear tort exemption contained in § 627.737(1), Florida Statutes (1984). If, as held in Mansfield, the PIP benefits are to be subtracted from a jury award by virtue of the exemption in § 627.737(1), it follows that the deductible should also be subtracted by virtue of the plain wording of §627.739(1). Just as this Court held in Mansfield that §627.737(1) would be effectively nullified and repealed if the PIP benefits are not subtracted from the jury award, so would §627.739(1) be effectively nullified and repealed if the PIP deductible is not subtracted from the jury award.

B. A set-off of the deductible is supported by legal precedent.

The Third District's decision in Rivero v. Mansfield, allowing an insured to recover the elected PIP deductible against a tortfeasor, is inconsistent not only with the plain language of §627.739(1) but also with compelling legal precedent, even within the Third District. In Johnson v. Prudential Property & Casualty Ins. Co., 365 So. 2d 441 (Fla. 3d DCA 1978), for example, the Third District affirmed the trial court's holding that "the plaintiffs, are not entitled to recover the deductible portion of personal injury protection benefits from the defendant insurer of a tort-feasor." Relying upon that portion of § 627.739, Florida Statutes (1977), which is now codified as § 627.739(1), the Third District stated:

> The trial court ruled that Section 627.739, Florida Statutes (1977) precluded recovery ... of the $2,000 deductible portion of personal injury protection benefits. The appellants, having failed to show any reason that the statute does not apply, we find no error.

365 So. 2d at 442. Additionally, in Verdicia v. American Risk Assur. Co., 543 So. 2d 321 (Fla. 3d DCA), *review denied*, 551 So. 2d 464 (1989), the Third District rejected the argument that §627.739(1) is unconstitutional in that it bars the insured from recovering a PIP deductible from a tortfeasor, stating:

> [T]he statutory provision ***eliminating the tort remedy against the tortfeasor for the PIP deductible*** is constitutional in any event. This is so because a reasonable alternative is provided therefor by the entire automobile no-fault scheme, namely, prompt payment for a reasonable portion of the damages sustained by the injured party. The PIP deductibles have a ceiling of $2,000; the insured pays less of a premium for the required PIP coverage; and the insured is substantially,

although not totally, compensated by PIP for the damages he sustains.

543 So. 2d at 322 (emphasis supplied).

The Fourth District in Heidenstrauch v. Bankers Ins. Co., 564 So. 2d 581, 582 (Fla. 4th DCA 1990), relied upon the Verdicia decision in rejecting the insured's argument that it is a denial of access to the courts to allow up to a $2,000 deductible "where the insured has no collateral coverage and without making another remedy available to the insured to recover the deductible amount (*such as by suit against the exempt tortfeasor*)." (emphasis supplied).

A Westlaw search for decisions of other jurisdictions uncovered no cases squarely addressing the issue of whether the deductible is properly set off from a jury verdict. However, the case of Krock v. Chroust, 478 A.2d 1376 (Pa. 1984) is noteworthy for its holding that the plaintiff's failure to actually receive PIP benefits is irrelevant to the issue of whether a tortfeasor is immune from paying those benefits. Following a route similar to that of this Court in Mansfield v. Rivero, the court in Krock held that the plain language of the Pennsylvania no-fault statute exempting tortfeasors from liability for the PIP amount precludes the insured from recovering that amount, regardless of whether the insured received that amount:

> Although there is no indication on the record as to whether appellant actually received those benefits, that fact is not determinative of the issue before us. Appellant had a right to recover such benefits; his failure to do so does not entitle him to seek recovery from the tortfeasor. To permit a plaintiff to maintain a cause of action for the first $15,000.00 of work loss

> simply because the plaintiff has not recovered that work loss from a no-fault insurance carrier would violate § 301, which abolished a cause of action in tort for the first $15,000 of lost earnings. A plaintiff cannot choose to forego collection of his basic loss benefits and then attempt to hold the tortfeasor liable for those economic losses otherwise recoverable.

478 A.2d at 1380. Similarly, it would violate the plain meaning of § 627.739(1) to allow a plaintiff, who has chosen to forego PIP payments by choosing a deductible amount, to then attempt to hold the tortfeasor liable for that amount.[1]

C. A set-off of the deductible is consistent with the legislative intent of the no-fault scheme.

A review of the statutory history of §§ 627.737 and 627.739 reveals that the legislative intent of the no-fault scheme was to exempt tortfeasors not only from the PIP benefits paid or payable, but also from the benefits which would have been payable *but for* the insured having elected a deductible. For example, the original version of § 627.737(1), enacted in 1971, expressly stated that a person was exempt from tort liability:

> 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 or deductible***.

See Ch. 71-252, § 8, at 1366, Laws of Fla. (emphasis supplied).

The words "or deductible" were later deleted from this statute in 1982 pursuant to Ch. 82-243, § 555, at 1567, Laws of Fla. However, this deletion appears to have been made only because of the simultaneous addition of the word "deductible" into §

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[1] A review of GEORGE J. COUCH, CYCLOPEDIA OF INSURANCE LAW (2d ed. 1983; Supp. 1994) was not instructive on the issue of whether the PIP deductible is recoverable against a tortfeasor.

627.739(1) pursuant to Ch. 82-243, § 557, at 1568, Laws of Fla., which contains the following pertinent additions and deletions:

> Any person electing a deductible or ~~such~~ modified coverage, or subject to such deductible or modified coverage as a result of the named insured's election, shall have no right to claim or recover any amount so deducted from any owner, registrant, operator, or occupant of a vehicle or any person or organization legally responsible for any such person's acts or omissions who is made exempt from tort liability by ss. 627.730-627.7405.

The retention of the word "deductible" in § 627.737(1) would have been redundant in view of its inclusion into § 637.739(1).

Additionally, the original version of § 627.737(2) described the then-$1,000 threshold for recovering for pain, suffering, mental anguish, and inconvenience, as "the benefits which are payable for such injury ... *or would be payable but for any exclusion or deductible* authorized by this act." See Ch. 71-252, § 8, at 1366, Laws of Fla.

As stated in Fortune Ins. Co. v. Sims, 464 So. 2d 251, 254 (Fla. 4th DCA 1985) the purpose of the deductible is to prevent duplicated benefits:

> [P]rohibiting an applicant from obtaining a PIP policy with a deductible unless he has other insurance to cover *all* of his potential types of damages would conflict with the stated purpose of section 627.739(1) to allow deductibles to prevent duplication of benefits.

(emphasis in original). The reasoning behind this purpose is that an insured is presumed either to have other insurance or benefits available, such as group health insurance, or to have the financial ability to cover the limited $2,000 amount.

The selection of a PIP deductible benefits the insured by

providing a reduced premium; the higher the deductible, the lower the premium. Verdicia v. American Risk Assur. Co., 543 So. 2d 321 (Fla. 3d DCA), *review denied*, 551 So. 2d 464 (1989). The insurance applicant pledges to cover the deductible portion of the PIP coverage in exchange for a reduced premium on the remaining portion of the PIP coverage. The applicant thus becomes, in effect, a self-insurer as to the deductible portion.

To allow an insured, who has chosen to be responsible for a deductible amount and benefitted thereby from a reduced premium, to later recover that deductible from a tortfeasor violates not only the plain language in § 627.739(1) that the insured "shall have no right to claim or recover any amount so deducted from ... any person," but also the purpose of the deductible in *preventing* such duplicated benefits.

Allowing the insured to sue for and collect the deductible amount is inconsistent with the no-fault purpose in preventing litigation. As stated in Lasky v. State Farm Insurance Co., 296 So. 2d 9, 16 (Fla. 1974):

> [W]e have concluded that the legislative purposes involved here included a lessening of the congestion of the court system [and] a reduction in concomitant delays in court calendars ....

Litigation is encouraged if an insured is entitled to recover the deductible amount from a tortfeasor.

Additionally, as noted in Lasky, an exemption from liability to the extent of the PIP coverage provides immunity from suit not only to the person sued by the insured, but also to the insured bringing the suit. 296 So. 2d at 14. The insured, by giving up

the right to recover for the PIP coverage, has gained "an immunity from being held liable for the pain and suffering of the other parties to the accidents" and "is assured of some recovery even if he *himself* is at fault." Id. at 14 (emphasis in original). Thus, although an insured who carries PIP coverage with a deductible cannot recover that deductible under § 627.739(1), the insured is protected against paying the deductibles of other persons involved in the accident.

Moreover, the insured retains the right to sue for damages exceeding the threshold limits of § 627.737(2), and retains the right to sue those persons who are *not* exempt from liability under the no-fault statutes due their failure to obtain coverage. The insured also retains the right to sue the tortfeasor for 20% of the medicals and 40% of the wages not recovered under the no fault act. Chapman v. Dillon, 415 So. 2d 12 (Fla. 1982). Recently, this Court held that the plaintiff in automobile cases can even recover future medical and wage loss despite a jury finding of no permanent injury. Auto-Owners Ins. Co. v. Tompkins, 651 So. 2d 89 (Fla. 1995).

D. Responses to points raised in Petitioner's Initial Brief

Petitioner's Brief fails even to cite the language of §627.739(1) and does not address its fundamentally clear and unambiguous meaning. Instead, Petitioner primarily relies upon the Third District's decision in Rivero v. Mansfield and urges that this Court in Mansfield v. Rivero reversed that decision on "other grounds," leaving intact the Third District's holding that an

insured may recover the elected PIP deductible from a tortfeasor.

A more accurate analysis of Mansfield is that this Court simply did not address the deductible issue, save brief mention in footnote two. 620 So. 2d at 989 n.2. The footnote, however, appears to have been mere *obiter dictum* recognizing that an insured is entitled to sue the tortfeasor for the 20% portion of the medicals not payable by the PIP carrier and distinguishing this 20% portion from the deductible portion. The premise of the Mansfield decision -- that it is error not to follow the clear language of the applicable no-fault statute -- should apply equally to the deductible statute.

Although it would be improper for this Court to rewrite the deductible statute, Petitioner has given this Court no compelling reason to do so. Petitioner merely laments that a plaintiff who has elected to be responsible for a certain deductible amount would be "punished" by being responsible for paying that amount. (I.B.10). Petitioner, however, overlooks the benefit conferred upon the insured by the reduced premiums. The $2,000 deductible will generally pay for itself through the incremental reduction in premium payments over time. Moreover, to require a tortfeasor/defendant, who played no part in the insured's decision to elect a deductible, to pay that deductible would unfairly "punish" one tortfeasor over the next; a tortfeasor sued by a party who elected a deductible would incur a higher net judgment for the same medical expenses as a tortfeasor sued by a party who did not elect a deductible. As stated by this Court in Chapman v. Dillon,

415 So. 2d 12 (Fla. 1982):

> Purchasers of insurance contracts choose one of the optional deductibles and we should presume that they do so with knowledge of the consequences.

415 So. 2d at 18.

Petitioner also cites to Industrial Fire & Casualty Ins. Co. v. Kwechin, 447 So. 2d 1337 (Fla. 1983), ostensibly to suggest that the intended application of the deductible as a set-off would deny access to the court. Kwechin, however, certainly does not hold as such. Kwechin addressed the liability imposed on an insurance agent who sells a policy and offers a $4,000 deductible without ascertaining if the insured has either alternate coverage or the ability to pay that amount. In fact, Kwechin supports the statutory exemption from tortfeasor liability as to the PIP deductible by suggesting that the insured has a remedy against the *insurance agent* if the agent knew at the time of the offer that the insured did not have additional coverage or the ability to pay the $4,000 deductible.

Although Petitioner argues that "[n]o court has ever imposed a self-insurance obligation on an injured person" (I.B.10), this Court in Kwechin noted that it is precisely *because* a person is a self-insurer as to the deductible amount that the practice of allowing an insurance applicant to opt for a large deductible of $4,000 should be prohibited, when there is actual knowledge that the applicant has insufficient resources to meet that deductible:

> To allow one who lacks any other applicable insurance coverage to purchase personal injury protection subject to a deductible of several thousand dollars ***makes that person, in effect, a self insurer*** for that not

inconsiderable amount ... .

447 So. 2d at 1339 (emphasis supplied). The Kwechin decision went on to approve those statutory provisions allowing for lower, more reasonable deductibles, and, in fact, approved of the purpose of §627.739(1) in "provid[ing] for a deductible to prevent overlapping coverage." Id; cf. International Bankers Ins. Co. v. Arnone, 552 So. 2d 908 (Fla. 1989) (noting that "the functional purpose of a deductible, *which is frequently referred to as self-insurance*, is to alter the point at which an insurance company's obligation to pay will ripen") (emphasis supplied).

CONCLUSION

The basic trend of Florida's no-fault law provides that the initial $10,000 of medical and wage loss is not shifted onto the tortfeasor's insurance carrier, but remains with the plaintiff's PIP carrier. Consistent with this principle, the PIP deductible should not be shifted onto the tortfeasor's carrier. Although this will require the insured to pay the deductible amount, this requirement is chosen voluntarily, provides the benefit of reduced premiums, and is consistent with the legislative purposes of preventing duplicative benefits, preventing litigation, and ensuring reciprocal immunity. The clear wording of § 627.739(1) mandates this result. To hold otherwise would repeal the statute. For the foregoing reasons, Respondent respectfully requests that this Court answer the certified question in the affirmative and affirm the Fourth District's opinion requiring that the trial court's order be reversed and remanded with directions to reduce the verdict by all PIP payments paid or owing, including the insured's PIP deductible.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Respondent's Answer Brief on the Merits was mailed this 20th day of September 1995 to: W. George Allen and Virginia D. Stow, Attorneys for Petitioner, Law Offices of W. George Allen, 305 South Andrews Avenue, Post Office Box 14738, Fort Lauderdale, Florida 33302, Telephone: (305) 463-6681, Facsimile: (305) 463-6685.

Respectfully submitted,

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