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IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,605

Florida Bar No. 184170

FILED
SID J. WHITE
MAY 19 1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs.

BONITA H. RUDNICK,

Respondent.

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

BRIEF OF PETITIONER ON THE MERITS
ALLSTATE INSURANCE COMPANY

(With Appendix)

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POINTS ON APPEAL

I. TRIAL COURT ERRED IN REFUSING TO REDUCE THE PLAINTIFF'S VERDICT BY PIP AND MED PAY BENEFITS AVAILABLE TO THE PLAINTIFF; RESULTING IN A FINAL JUDGMENT WHICH CONSTITUTES A DOUBLE RECOVERY FOR THE PLAINTIFF; WHICH JUDGMENT MUST BE REVERSED AND REDUCE BY ALL AVAILABLE COLLATERAL SOURCE BENEFITS, INCLUDING PIP AND MED PAY.

II. THE TRIAL COURT ERRED IN REFUSING TO REDUCE THE AMOUNT OF THE JURY'S AWARD BY MED PAY BENEFITS AVAILABLE TO THE PLAINTIFF AND THE FINAL JUDGMENT BELOW MUST BE REVERSED.

III. TRIAL COURT ERRED IN FAILING TO DEDUCT WORKERS' COMPENSATION BENEFITS PAID, WHICH AS A MATTER OF LAW, MUST BE SET-OFF AGAINST THE VERDICT AND THE FINAL JUDGMENT BELOW MUST BE REVERSED AND ENTERED FOR ALLSTATE.

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STATEMENT OF THE FACTS AND CASE

A. Overview

Rudnick was involved in an accident with an underinsured motorist, Canada (R 1-3). Rudnick settled with Canada and sued Allstate, her UM carrier (R 1-3). The Parties stipulated before trial that all offsets, including collateral source benefits, would be taken care of post trial (R 90-92). The jury returned a Verdict for Rudnick for $21,500 in past and future medical expenses (R 100A-100B). The trial judge refused to set off any collateral sources, including $15,000 in PIP and med pay coverage and workers' compensation benefits. The trial judge entered a Final Judgment in the amount of $11,500, subtracting only Rudnick's $10,000 tort settlement with Canada (R 131-132). Allstate appealed as the Judgment was contrary to the law and the Fourth District affirmed; holding no collateral sources had to be set-off. Allstate Insurance Co. v. Rudnick, 23 Fla. L. Weekly D497 (Fla. 4th DCA Feb 18, 1998) (A 1-2). The District Court certified the case in direct and express conflict with Kokotis v. DeMarco, 679 So. 2d 296 (Fla. 5th DCA 1996), rev. denied, 689 So. 2d 1068 (Fla. 1997); as it did in Pizzarelli v. Rollins, 704 So. 2d 630 (Fla. 4th DCA 1997) Fla. Sup. Ct. Case No. 92080 and Giannou v. Peck, 23 Fla. L. Weekly D631 (Fla. 4th DCA March 4, 1998).

B. Specific Facts

On January 27, 1995 the Plaintiff, Rudnick, was involved in

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a motor vehicle accident with Crystal Canada (R 1-3; 90-92). Canada had $10,000 in liability coverage and settled with the Plaintiff (R 101). All the Plaintiff's medical bills were paid by her workers' compensation carrier, Riscorp; the Plaintiff paid $3,000 back to this carrier in settlement of the workers' compensation lien; and the Plaintiff was then reimbursed the $3,000 by Allstate (R 90-92; Supplemental Record A 1-3; H 13). Rudnick has a total of $10,000 in PIP coverage and $5,000 in med pay coverage with her carrier, Allstate (R 90-92).

Rudnick sued Allstate for uninsured motorist coverage and stipulated pre-trial that there was $15,000 in coverage with Allstate for PIP and med pay, which was payable and that all offsets, including collateral sources, would be handled post-trial (R 1-3; 90-92). Liability was admitted and the case went to trial on damages only (R 90-92). The jury returned a Verdict finding no permanent injury and awarded the Plaintiff $6,500 in past medical expenses and $15,000 in future medical expenses (R 100A-100B). The Plaintiff filed a Motion for Entry of Judgment, asserting that the $21,500 awarded to the Plaintiff, should be reduced only by the $10,000 paid by the tortfeasor's liability carrier and not by any collateral sources paid or payable (R 100).

At the post-trial hearing, the Plaintiff, Rudnick, told the court that any further deductions, beyond the tortfeasor's policy limits, would constitute a windfall to Allstate and that Allstate was attempting to get a double set-off for workers' compensation

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benefits that were paid, as well as the tortfeasor's liability limits that satisfied the workers' compensation subrogation lien (H 3). Rudnick claimed that there were no cases on point, to support Allstate's position that there had to be collateral source set-offs, in addition to subtracting the tortfeasor's policy limits from the Verdict (H 3-4). Rudnick argued that there would be no duplication of benefits if Allstate had to pay the remaining $11,500 of the Plaintiff's Verdict; so, if the court gave a collateral source set-off this would be a windfall to Allstate, in that it would not have to pay the $10,000 it would otherwise be obligated to pay on the total Verdict (H 3-4). The Plaintiff continued to argue that she would be short $10,000 if the collateral source set-offs were given, and that there was no authority for such a set-off (H 5).

Allstate asserted that not only was there a set-off for the workers' compensation benefits that were paid, in addition to the tortfeasor's settlement of $10,000, but there was also a set-off for all the PIP and med pay benefits that were still payable under the Plaintiff's PIP policy (H 5). Allstate noted that under the uninsured motorist statute, it expressly stated that there should be no UM benefits paid, in that UM coverage was simply over and above available coverage, and could not duplicate benefits under workers' compensation, PIP, etc. (H 6-7). Therefore, where Rudnick had benefits both paid and still available, under the collateral source rule, those benefits had to be deducted from the Plaintiff's Final Judgment; and Allstate

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discussed all the cases that required the collateral source set-offs (H 7-13). The trial court thanked the parties and announced that only the $10,000 tortfeasor settlement amount would be deducted and a judgment would be entered for the Plaintiff in the amount of $11,500 (H 13).

Allstate appealed, as the collateral source statutes and Chapter 627 require an offset for collateral source benefits paid and payable and the Final Judgment had to be reversed and corrected for these collateral sources (R 133-136). On appeal, the Fourth District affirmed the refusal to make any collateral source set-offs and decided that the term "payable" meant due and owing only and not benefits that could be claimed and collected after trial. Rudnick, D498. The Court made no provisions for any workers' compensation set-off either. Rudnick, D498. On certified conflict, Allstate invoked the jurisdiction of this Court to resolve the issues of collateral source set-offs in PIP cases; an issue raised in dozens of appeals around the State.

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SUMMARY OF ARGUMENT

Rudnick was in an accident and settled with the tortfeasor for her policy limits of $10,000. Rudnick's medical bills were completely paid by her workers' compensation carrier. Rudnick sued Allstate, her UM carrier, and received a Verdict for $6,500 in past medicals and $15,000 in future medicals for a total of $21,500. In addition to the fact that all of her past medicals had already been paid by the workers' compensation carrier, Rudnick had $15,000 in PIP and med pay benefits. In direct and express conflict with existing law in the no-fault statue, Chapter 627 and the collateral source statute, § 768.76, Fla. Stat. (1995), the trial judge refused to offset anything from the Plaintiff's Verdict, except the $10,000 liability settlement with the tortfeasor. This was clear reversible error, as a matter of law and the Final Judgment must be reversed and reduced by all PIP and med pay benefits paid and payable and the workers' compensation benefits paid and a judgment entered for Allstate.

The Fourth District's opinion makes no allowance for the fact that the Plaintiff can keep a $6,500 double recovery for her past medical bills; which were already paid by her workers' compensation carrier and she was fully reimbursed for the lien by Allstate, out of her PIP benefits. Rudnick also gets a double recovery for the remainder of her PIP benefits that she can claim against the $15,000 in PIP and med pay coverage, which is all collectable, without any time limit into the future. In other words, Rudnick gets $6,500 for expenses which were fully paid and

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$15,000 for future damages; which she can collect again from Allstate. This is certainly not the result intended by the legislature, nor the public policy behind the no-fault law. It also conflicts with the express language in both the PIP and tort collateral source statutes. This case presents the perfect opportunity for the Court to explain once and for all, how all the collateral sources are to be deducted in PIP cases for paid and "payable" PIP; for med pay benefits; how deductions are to be made and from which awards, past and/or future; how reimbursed workers' compensation benefits are to be deducted and in what amounts, bills actually paid versus a workers' compensation lien settlement amount; so that all the judges and litigants in Florida will be using the same rules.

The Fourth District ruled that "paid and payable" referred only in the term "payable" to benefits which have already been billed to the insurer but not paid; and that medical bills to be incurred in the future are not included under "payable," even though PIP coverage will pay them. Nothing in the statute remotely suggests such an interpretation. If they will be paid by PIP coverage they should be offset as a collateral source, to prevent a double recovery.

The strained efforts by the Fourth District, to justify its change of the express law in Florida decided by this Court and the legislature, do not stand up to the clear intent to have all collateral sources deducted, to prevent a windfall to the Plaintiff and to maintain the tort immunity given in Chapter 627,

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in exchange for mandatory financial responsibility. The Fourth District has simply redefined "payable," from its ordinary meaning, to allow greater recovery than the law permits. The Fifth District's decision in Kokotis must be approved and the Opinion below quashed with instructions to deduct all collateral source benefits--paid and payable without restriction. The Defendant is immune by law from paying these amounts and a judgment must be entered for Allstate.

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ARGUMENT

I. TRIAL COURT ERRED IN REFUSING TO REDUCE THE PLAINTIFF'S VERDICT BY PIP AND MED PAY BENEFITS AVAILABLE TO THE PLAINTIFF; RESULTING IN A FINAL JUDGMENT WHICH CONSTITUTES A DOUBLE RECOVERY FOR THE PLAINTIFF; WHICH JUDGMENT MUST BE REVERSED AND REDUCE BY ALL AVAILABLE COLLATERAL SOURCE BENEFITS, INCLUDING PIP AND MED PAY.

Rudnick was in an accident and settled with the tortfeasor for her policy limits of $10,000. Rudnick's medical bills were completely paid by her workers' compensation carrier, the lien was settled and paid by Rudnick for $3,000 and Rudnick received the $3,000 back out of her PIP coverage with Allstate. Rudnick sued Allstate, her UM carrier, and received a Verdict finding no permanency and awarding $6,500 in past medicals and $15,000 in future medicals for a total of $21,500. Rudnick had $15,000 in PIP and med pay benefits available. In direct and express conflict with existing no-fault law, Chapter 627 and the collateral source statute, § 768.76, the trial judge refused to offset anything from the Plaintiff's Verdict, except the $10,000 liability settlement with the tortfeasor. This was clear reversible error, as a matter of law and the Final Judgment must be reversed and reduced by all PIP and med pay benefits paid or payable in the future related to this accident and workers' compensation benefits paid and reimbursed and a judgment entered for Allstate.

There is no question that if Allstate pays the $11,500 Final

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Judgment to the Plaintiff, this constitutes a double recovery, an issue not addressed at all in Rudnick in spite of the fact that it was argued both in the trial court and on appeal. All the Plaintiff's past medical bills have already been paid and she is not out of pocket anything for those; her future medicals are covered by PIP and med pay benefits. The Order below, which does not subtract any benefits or payments, is in direct and express conflict with the no-fault law. The Final Judgment deducting only the tortfeasor's settlement is also in direct and express conflict with the tort collateral source statute § 768.76, Fla. Stat. (1995) and Florida case law directly on point.

To arrive at the correct judgment amount we first look at the fact that Rudnick was awarded $6,500 in past medical expenses. Those past medical expenses were fully covered by her workers compensation carrier, whose lien was completely paid off by Allstate, with $3,000 from the Plaintiff's available PIP coverage. That leaves no past damages owed. Regarding the $15,000 awarded for future medical expenses, the Plaintiff has a right to claim $12,000 of that against her remaining PIP coverage and her entire med pay coverage ($15,000 - 3,000 = $12,000). Subtracting the $12,000 available or payable from the jury award, leaves a $3,000 verdict for the Plaintiff ($15,000 - 12,000 = $3,000).

From this $3,000 verdict amount, $10,000 must be subtracted for the liability settlement with the tortfeasor. This negative number ($3,000 - 10,000 = -$7,000) simply reflects the fact that

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all the damages awarded by the jury, were already covered by the tortfeasor's carrier, the workers' compensation carrier and the UM carrier. Final Judgment must be entered for Allstate.

Another way to arrive at the final judgment is if the $10,000 settlement with the Plaintiff is first subtracted from the total Jury Verdict of $21,500; this leaves $11,500 for past and future medical expenses, which the trial judge correctly calculated. However, of the $11,500 remaining in medical expenses, there is still $12,000 available in PIP and med pay coverage payable. Subtracting $12,000 from $11,000 also leaves a negative result; and again the Plaintiff will have recovered everything she is entitled to, all her damages both past and future are taken care of and there is no duplication of benefits. The two sets of calculations are:

$15,000	future medicals	$15,000	future medicals
- 12,000	PIP & med pay	- 10,000	tort settlement
3,000		5,000	
- 10,000	tort settlement	- 12,000	PIP & med pay
$-7,000	judgment for Defendant	$-7,000	judgment for Defendant

The relevant statutes involved are as follows:

> **§ 627.727. Motor vehicle insurance; uninsured and underinsured vehicle coverage; insolvent insurer protection ...**
>
> ... The coverage described under this section shall be over an above, but shall not duplicate, the benefits available to an insured under any workers' compensation law, personal injury protection benefits, disability benefits law, or similar law; under any automobile medical expense coverage; under any motor vehicle liability

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insurance coverage; or from the owner or operator of the uninsured motor vehicle or any other person or organization jointly or severally liable together with such owner or operator for the accident; and such coverage shall cover the difference, if any, between the sum of such benefits and the damages sustained, up to the maximum amount of such coverage provided under this section. The amount of coverage available under this section shall not be reduced by a setoff against any coverage, including liability insurance ...

* * *

§ 627.736. Required personal injury protection benefits; exclusions; priority ...

(3) Insured's rights to recovery of special damages in tort claims.--No insurer shall have a lien on any recovery in tort by judgment, settlement, or otherwise for personal injury protection benefits, whether suit has been filed or settlement has been reached without suit. An injured party who is entitled to bring suit under the provision of §§ 627.730-627.7405, or his legal representative, shall have no right to recover any damages for which personal injury protection benefits are paid or payable. The plaintiff may prove all of his special damages notwithstanding this limitation, but if special damages are introduced in evidence, the trier of facts, whether judge or jury, shall not award damages for personal injury protection benefits paid or payable. In all cases in which a jury is required to fix damages, the court shall instruct the jury that the plaintiff shall not recover such special damages for personal injury protection benefits paid or payable ...

* * *

§ 627.737. Tort exemption; limitation on right to damages; punitive damages

(1) Every owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as required by ss. 627.730--627.7405, and every person or organization legally responsible for his acts or omissions, is hereby exempted

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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. 628.736(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 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).

* * *

§ 768.76. Collateral sources indemnity

(1) In any action to which this part applies in which liability is admitted or is determined by the trier of fact, and in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to him, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists ...

As the Supreme Court restated in Blue Cross and Blue Shield of Florida, Inc. v. Matthews, 498 So. 2d 421 (Fla. 1986), the direct purpose and effect of the PIP statute is to prevent double recovery by plaintiffs of collateral source payments in personal injury suits arising from motor vehicle accidents. Under the terms of the statute the plaintiff continues to claim full damages, but any collateral source payments are subtracted from the damage verdict. Blue Cross, supra; Purdy v. Gulf Breeze Enterprises, Inc., 403 So. 2d 1325, 1328 (Fla. 1981) rights of

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subrogation for PIP carrier enacted to prevent injured plaintiffs from receiving double recovery).

Under § 627.736(3) no claimant shall have any right to recover damages for which PIP benefits are paid or payable. The restriction on the recovery of PIP benefits paid or payable is the trade off for having the required PIP coverage under § 627.733(1), Fla. Stat. (1991). In other words in Florida, under the No Fault Act, everyone is required to maintain PIP protection so that if they are involved in an accident, regardless of whether they are at fault or not, they can immediately receive medical benefits, lost wages and death benefits. The purpose of the Florida No Fault Act was to broaden insurance coverage, while at the same time reasonably limiting the amount of damages that could be claimed by the insured. Farley v. Gateway Insurance Company, 302 So. 2d 177, 179 (Fla. 2d DCA 1974). The Second District pointed out that the No Fault Act should not be construed restrictively. Farley, supra. This purpose was expressly stated by the legislature:

> **627.731. Purpose**
>
> The purpose of ss. 627.730-627.7405 is to provide for medical, surgical, funeral, and disability insurance benefits without regard to fault, and to require motor vehicle insurance securing such benefits, for motor vehicles required to be registered in this state and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain, suffering, mental anguish, and inconvenience.
>
> § 627.731, Fla. Stat. (1991).

Therefore a person injured in an automobile accident must

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look to her PIP carrier to pay initial medical benefits and/or lost wages, because she is entitled to recover these benefits whether she was at fault or not. In other words, the injured party can immediately recover lost wages and/or medical benefits for reasonable and necessary medical care without having to file suit. Another provision of the No Fault Act also entitles the tortfeasor to immunity from non-economic damages, if the tortfeasor maintains the required amount in financial responsibility limits as well. See, § 627.737, Fla. Stat. (1991).

In the present case the Plaintiff did not prove a permanent injury and the jury awarded her $21,500 in past and future medical benefits. Under § 627.736 this recovery had to be set off by the PIP and med pay benefits paid and payable. The statute mandates that the PIP benefits must be set-off from the award and are not recoverable by the Plaintiff.

The Fourth District adopted the common sense test set out by the Third District in Centennial Insurance Company v. Fulton, 532 So. 2d 1329 (Fla. 3d DCA 1988); Langel, infra. In Centennial, an undifferentiated arbitration award was given to the claimant in the amount of $1,125,500 as the total damages suffered by Mr. Fulton. Centennial, 1330. This amount was then reduced by Fulton's 75% comparative negligence, for a total award of $281,375. The plaintiff had received $67,237.10 in medical expenses and lost wages from his workers' compensation carrier. Centennial, 1330. Therefore Centennial, on behalf of the

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tortfeasor, reduced the arbitration payment, by the amount of workers' compensation benefits paid to the plaintiff. Centennial, 1330.

The plaintiff appealed claiming that Centennial had not shown that the arbitrators had actually included these workers' compensation benefits in the award and therefore no set-off was proper. Centennial, 1330. The plaintiff also claimed that there was no evidence before the arbitrators as to the actual worker's compensation amount paid. Centennial, 1330. The appellate court rejected the plaintiff's arguments, finding that common sense required a holding that the arbitration award, which was given for the plaintiff's total damages, included the medical bills and lost wages paid by the workers' compensation carrier. Centennial, 1330-1331. In other words, the common sense of the matter demonstrated a duplication in the jury's award of the collateral source benefits paid. Centennial, 1331. The court expressly found that if the plaintiff was right, that the insurance carrier had the burden of proof to demonstrate that the award encompassed the collateral source, the common sense of the situation itself showed that the burden had been met. Centennial, 1331.

In the present case, the jury specifically rejected any claim for permanent injuries and limited its award to the Plaintiff's claim for past and future medical expenses. Under the Centennial common sense test, the jury's award had to include all benefits paid to the Plaintiff. Centennial, 1331.

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The bottom line in Centennial was that the insurer had established at least a prima facia showing that duplication indeed had occurred. Under Centennial the common sense test was more than met in the present case, where the Plaintiff's only claims for past and future economic damages were for medical benefits; which were paid or payable under the PIP statute and therefore the $15,000 set-off was mandatory; before or after deducting the Plaintiff's liability settlement with Canada.

The Fourth District in Aetna Casualty & Surety Company v. Langel, 587 So. 2d 1370 (Fla. 4th DCA 1991) adopted the Centennial common sense test and again required a set-off for PIP and med pay benefits, on a general verdict of $450,000. Langel, 1373. The Fourth District found that the general verdict amount logically must have included the most basic elements of damages, such as those for which PIP and med pay are payable in the first place. Langel, 1373. Therefore under the common sense test there was a duplication of damages awarded by the jury and the PIP and med pay benefits had to be set-off, as collateral sources. Langel, 1373.

The trial judge incorrectly believed that only the settlement with the tortfeasor had to be set-off and this was clear legal error. The Fifth District has held that all PIP benefits are deductible from a jury award, even if they have not been claimed nor paid yet. Kokotis v. DeMarco, supra.

In Kokotis the court noted that the tortfeasor is responsible for all damages caused by his negligence, unless

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relieved from this duty to pay by statute. Kokotis, 297. Since this was an automobile case, the plaintiff had received an award of only medicals, after the jury found no permanent injury, just like the present case. The jury awarded DeMarco $670 for past medical bills and $10,000 for future medical bills. Kokotis, 297. The parties agreed that the PIP benefits paid already were properly set-off against the past medical expenses and the question was what to do with the rest of the PIP benefits, which were available in the future and whether they should be set-off under Chapter 627. Kokotis, 297. This appellate court also found that the auto collateral source statue, which was in effect at the time of the accident, had to control the set-off issue; and not § 768.76. Kokotis, 297; see also, White v. Westlund, 624 So. 2d 1148 (Fla. 4th DCA 1993), rev. dism., 640 So. 2d 1109 (Fla. 1994); Kirkland v. Allstate Insurance Company, 655 So. 2d 106 (Fla. 1st DCA 1995). The court held that since DeMarco had PIP benefits which were and are still available to cover his future medical expenses, he could not collect those damages from the tortfeasor. Kokotis, 297. All of the benefits available to the plaintiff from his PIP carrier, were either paid or payable under the statute and therefore were collateral sources that had to reduce the plaintiff's jury award. Kokotis, 297.

The appellate court applied § 627.736(3) which provides that an insured party has no right to recover any damages for which PIP benefits are "paid or payable" and "payable" included the future expenses which have not occurred but which will result

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from the covered injury. Kokotis, 297. To refuse to deduct the future PIP benefits still available under the policy would "permit double recovery for these expenses -- a result the statute neither contemplates nor authorizes." Kokotis, 297.

Applying Kokotis to the present case, it is clear that the $15,000 in benefits was paid or payable for Rudnick's medical expenses. The undisputed paid or payable amount of $15,000 must be deducted from the Plaintiff's award at trial; just as the Plaintiff's liability settlement was deducted. The Plaintiff has ample coverage under PIP and med pay to cover the entire jury award and there are no damages that exceed this coverage, nor were there damages outside this coverage, like pain or suffering. The Plaintiff is made whole since all the damages awarded are fully covered by her settlement with Canada and her collateral source benefits. Kokotis, supra.

Even under § 768.76, the general collateral source statute, the entire PIP and med pay collateral source benefits had to be set-off from the jury's Verdict for Rudnick. There is absolutely no public policy reason to allow the Plaintiff to recover her medical expenses twice! Since that is all that the jury Verdict was comprised of, it is clear not only in the Record, but under the common sense test, that the Plaintiff did receive a duplication of benefits under the Final Judgment, which must be reversed and judgment entered for Allstate.

The trial judge and the Fourth District were apparently swayed by the fact that if the mandatory collateral source

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set-off was made, this would mean the Plaintiff would collect nothing further from Allstate, beyond her PIP and med pay benefits. Therefore both just refused to subtract the PIP and med pay benefits, to prevent the Plaintiff from having a zero judgment. However, the Plaintiff is fully covered for her damages and neither court had any explanation or justification for allowing the double recovery of $11,500 cash-in-hand for expenses fully covered.

The Fourth District also completely ignored § 627.737 to arrive at its no deductions opinion. There is no definition of "payable" in the PIP statute, so the Fourth District adopted one to fit the conclusion it wanted to reach. § 627.736 is the section of the PIP statute that requires every driver to collect his or her damages for non-permanent personal injury and economic loss from their own insurance carrier and in exchange gives an exemption from tort liability for those types of damages under Florida's no-fault statutory scheme. § 627.737(1) expressly states there is immunity from having to pay damages covered by PIP which "would be payable." § 627.737(2) specifically declares that only when there is a significant or permanent loss to a bodily function or permanent injury can a person maintain an action in tort against the owner of a motor vehicle to recover special damages such as pain, suffering, mental anguish, etc., those damages not covered by PIP or med pay benefits.

In Mansfield v. Rivero, 620 So. 2d 987 (Fla. 1993) an automobile accident caused Rosa Rivero allegedly to sustain

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permanent physical injuries. While the Mansfields admitted liability, they denied that Rosa Rivero suffered any permanency and the trial proceeded on the issue whether Rosa Rivero crossed the permanency threshold. The parties stipulated that the amount of medical expenses was $3,405.30. The jury found no permanency and awarded past medicals of $3,405.30; and no lost wages.

Mansfield filed a motion for reduction of the medical bills, asserting compliance with the financial security requirements of the no-fault law; that it was undisputed that the plaintiff had the mandatory PIP insurance policy, and that coverage was available for the $3,405.30 of unpaid medical expenses and they should be reduced by 80%. The trial court granted the motion and awarded Rivero $681.06, or the 20% of the unpaid medical expenses not covered by her PIP insurance policy.

On appeal, the Third District Court of Appeal reversed, finding that the trial court erroneously reduced the judgment by the amount of PIP coverage. The district court rejected the argument that Rivero must seek coverage from her PIP carrier, finding:

> Nothing in the law "prevents injured persons from waiving their rights to receive insurance benefits and suing the tortfeasor for the full amount of their damages." Purdy v. Gulf Breeze Ent., Inc., 403 So.2d 1325, 1329 (Fla.1981); Blue Cross & Blue Shield of Fla. v. Matthews, 498 So.2d 421, 422 (Fla.1986). The record establishes that the Riveros' insurance carrier has refused to

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> provide them any benefits; no rule requires them to recover from the carrier.
>
> Mansfield, 989, quoting Rivero v. Mansfield, 584 So. 2d 1012, 1014 (Fla. 3d DCA 1991).

This Court disagreed, because it found that the Third District failed to apply the clear exemption contained in § 627.737(1) for payable PIP benefits. Because the jury found that no permanent injury existed, the defendant was exempted from tort liability by the express provisions of § 627.737(1) to the extent of the personal injury protection benefits. The Court found that nothing in the record established that the Riveros did not have PIP coverage. The Court found that the trial court was correct, that Rosa Rivero was entitled to recover only 20% of the damages not payable under her PIP coverage.

The rationale applied by this Court in Mansfield controls this case as well. To accept the Fourth District's holding below would, in effect, nullify a fundamental part of the no-fault law. This Court noted that the no-fault statutory scheme set up a method where an injured party could immediately recover the bulk of out-of-pocket expenses from their carrier, where the injury failed to reach the permanency threshold in § 627.737(2). The Mansfield Court opined that the Third District's holding, that would allow an injured person to waive his or her rights to receive insurance benefits and sue the tortfeasor, would effectively nullify and repeal the scheme of PIP recovery mandated in the no-fault law by the legislature.

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This Court cited to Iowa National Mutual Insurance Company v. Worthy, 447 So. 2d 998, 1001 (Fla. 5th DCA 1984); which applied the exemption found in § 627.737 stating that § 627.737(1) exempts "a tortfeasor from tort liability for damages because of bodily injury caused by a motor vehicle only 'to the extent that benefits described in section 627.736(1) are payable for such injury, or would be payable but for any [authorized] exclusion.'" Mansfield, 990.

The Court concluded that the record reflected that both sides had PIP coverage as required by the statute, and because the jury found that no permanent injury existed, the defendant was exempted from tort liability by the express provisions of § 627.737(1) to the extent the PIP benefits would be payable under the Rivero PIP policy. The same exact result must occur in this case. Rudnick had PIP coverage as required by the statute, and because the jury found that no permanent injury existed, the Defendant was exempt from tort liability by the express provision of § 627.737(1) to the extent that PIP benefits were payable under Rudnick's PIP policy.

To circumvent the clear language of the statute and case law on point, the Fourth District just changed the definition of "payable," restricting it to amounts due and owing at the time of trial. Rudnick, D498. The court made no allowance for duplicate recovery that would occur by implementing its dictionary definition of "payable." The court justified its result by relying on its own definition of "available." In Pizzarelli,

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supra, based on its own interpretation of "otherwise available" in White, supra, the self-perpetuating authority of the Fourth District was used and simply cements the conclusion that there is no statutory, nor case law, basis for the Fourth's restrictive use of "payable" to allow injured parties double recoveries otherwise barred by Florida's no-fault law.

In fact, "payable" must include future claims related to the same accident because there is no time limitation for these PIP claims in the PIP statute. PIP benefits, for reasonable and necessary care due to the accident, must be paid as those damages occur, regardless of how long it is from the date of the accident. State Farm Mutual Automobile Insurance Company v. Lee, 678 So. 2d 818 (Fla. 1996)(statute of limitations in PIP cases does not begin to run until the time the policy is breached and the claimed benefits are denied; rejecting argument that statute starts to run on the day of the accident); State Farm Mutual Automobile Insurance Company v. Swearingen, 590 So. 2d 586 (Fla. 4th DCA 1991)(three-year time limit for med pay coverage invalid, as such limitation would defeat legislative intent for med pay to supplement PIP coverage, which has no such limitation).

In the present case, Rudnick is fully covered by PIP and med pay for all the damages awarded by the jury; but the Final Judgment requires Allstate to pay this amount again under its UM policy. Such a payment duplicates all the available PIP and med pay coverage for the exact same damages. Rudnick had no severe injury, had no permanent injury and had no damages in excess of

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what was undisputedly covered by her PIP and med pay policy. Since there was no dispute that the $10,000 set-off had to be deducted from the Verdict for Rudnick's settlement with Canada; no matter how the remainder of the $11,500 in damages are computed, the bottom line is still that all of Rudnick's medical expenses awarded by the jury were and are fully covered by PIP and med pay and the Final Judgment below must be reversed and a judgment entered for Allstate.

It has long been the law in Florida that an uninsured motorist carrier is entitled to a set-off for benefits paid or payable under no fault PIP coverage when these benefits would reimburse the insured for the same damages sought to be covered by the uninsured motorist policy. Stuyvesant Insurance Company v. Johnson, 307 So. 2d 229 (Fla. 4th DCA), cert. denied, 316 So. 2d 290 (Fla. 1975); Hartford Accident and Indemnity Company v. Lackore, 408 So. 2d 1040 (Fla. 1982)(while uninsured motorist carrier can not automatically set-off from its coverage the amount of PIP and med pay benefits available to the insured; it is entitled to set-off the benefits available to the insurer which would reimburse the insured for the same damages so as to prevent duplication of benefits); Douglas v. Iowa National Mutual Insurance Company, 409 So. 2d 1029 (Fla. 1982)(the carrier entitled to set-off benefits available to insured which would reimburse him for same damages).

All the damages sought by Rudnick in this case were limited to past and future medical expenses, which were fully covered by

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PIP and med pay. As a matter of law, Allstate was entitled to a set-off for the full amount of this coverage paid and payable and the Final Judgment below must be reversed and enter for Allstate.

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II. THE TRIAL COURT ERRED IN REFUSING TO REDUCE THE AMOUNT OF THE JURY'S AWARD BY MED PAY BENEFITS AVAILABLE TO THE PLAINTIFF AND THE FINAL JUDGMENT BELOW MUST BE REVERSED.

While the automobile statutes require a set-off from uninsured motorist coverage of all PIP and med pay benefits paid and payable, the same result was mandated by § 768.76, the collateral sources of indemnity statute.

To date, this Court has not addressed how or if the tort set-off statute applies in an auto case, in light of § 627.736. The Fourth District has ruled that only § 627.736 applies and not § 768.76. White, supra; see also, Kirkland, supra (§ 768.76 does not apply in auto case, § 627.7372 in effect at time of accident controls); Pizzarelli, supra. However, the Fourth District found "payable" did not include future available PIP benefits under § 768.76 as well. Rudnick, supra, D498. Allstate asserted below that if § 768.76 applied, it too would bar the Plaintiff's double recovery in this case and for this additional reason, the Judgment must be reversed and entered for Allstate.

An additional issue of first impression for this Court to resolve is whether med pay benefits are to be deducted under the PIP statute and/or § 768.76 from the Verdict as benefits "otherwise available." According to the Fourth District, they are not set off, however the plain meaning of § 768.76 alone would require the med pay benefits be deducted.

§ 768.76 was enacted as part of the Tort Reform Act in 1986 and mandates that the court must reduce the amount of any jury

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award by the total of all amounts which have been paid for the benefit of the claimant or which are otherwise available to him from all collateral sources. In the present case, after subtracting the settlement with the tortfeasor of $10,000, Rudnick had a Verdict of $11,500 in past and future medical expenses. $3,000 of PIP coverage was used in settlement of the full amount of workers' compensation benefits to completely cover all Rudnick's past medical expenses. That left $12,000 in PIP and med pay coverage available to her, for the remainder of her medical expenses. Since she only had $11,500 in medical expenses, this was totally covered by the PIP and med pay coverage and therefore, the Final Judgment which was not reduced for these collateral sources available to Rudnick and paid to her, was in direct violation of the tort collateral source statute.

The statute is absolutely mandatory, stating that the court "shall reduce the amount of such award" by the total of all amounts paid to the claimant, or otherwise available, from all collateral sources for which there is no right of subrogation. Under the PIP statute there is no right of subrogation for PIP and med pay coverage and therefore, these collateral sources of indemnity must be set off from the Plaintiff's award as expressly required by § 768.76.

In subsection (2)(a) the statute defines collateral sources, for the purposes of deduction, to include any "automobile accident insurance that provides health benefits or income

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disability coverage." § 768.76(2)(a)2. When the statute was passed in 1986, the legislature clearly was aware of the fact that automobile accident policies included provisions for both PIP and med pay coverage, and the statute simply uses the generic term health benefits which would certainly cover both of those types of medical health benefits. The Fifth District in Sutton v. Ashcraft, 671 So. 2d 301 (Fla. 5th DCA 1996), stated that it appeared that medical payments did not fall within the definition of a collateral source under subsection (2), without any rationale whatsoever. Sutton, 304. Instead the Fifth District cited to a previous decision out of the First District Pensacola Junior College v. Montgomery, 539 So. 2d 1153, 1156 FN. 3 (Fla. 1st DCA 1989) which also made that same statement without any rationale or reason given.

Therefore, the question of whether medical payments are the collateral source benefits subject to § 768.76 is not only a question of first impression in this Court, but one requiring careful examination, as no rationale or reason is given in recent case law for the conclusion that med pay would be excluded from collateral sources, as defined in the collateral source statute. Since the entire purpose of the collateral source statute is to avoid duplication of the payment of benefits, there does not seem to be any rationale or public policy reason why PIP would have to be deducted under § 768.76, but med pay would not.

The final consideration regarding § 768.76, assuming arguendo that it is applicable in an automobile case, is that

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future benefits under the Fifth District's decision in Kokotis, supra, would be available to the claimant, and thus deductible under this collateral source statute. However, the Fourth District in White, supra, held that future earned disability benefits could not be set-off from an award as a collateral source under § 768.76. White, 1153. The court reasoned that benefits "available" meant accessible for use in the present, rather than the future, and the statute in subsection (2) referred to only payments made and therefore, this could not include any future earned disability benefits. White, 1153. It would appear that this conclusion in White is in direct and express conflict with the Fifth District's decision in Kokotis, at least to this extent that PIP benefits available in the future must be deducted from the jury's award as those payments are paid and payable, and the Plaintiff is not entitled to recover them. If the Plaintiff could not recover future damages under the PIP statute itself, as they are expressly held to be unrecoverable by the claimant, it would seem at odds to hold that the same benefits, if looked at under § 768.76, are available. It would therefore be consistent to hold that the PIP and med pay benefits in the future are deductible as a collateral source, even under § 768.76.

If § 768.76 is interpreted as allowing a collateral source set-off only for med pay payments actually paid, the end result in this particular case is the same, as the following calculation would have to be made. The entire amount of past medical

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expenses has been paid and that amount was compromised by settling the subrogation lien of the workers' compensation carrier with a payment of $3,000 from Rudnick's PIP coverage. That leaves Rudnick with an award of future medical expenses of $15,000. From that amount first we must subtract $10,000 in settlement with Canada. Dewberry v. Auto-Owners Insurance Company, 363 So. 2d 1077 (Fla. 1978). That leaves $5,000 which is completely covered by the remaining $7,000 in PIP coverage, without even using any medical payments coverage whatsoever. The final result is the same as it would be under Point I; in that the Final Judgment for the Plaintiff is for zero dollars, as all benefits awarded by the jury are fully covered by her settlement with the tortfeasor and the benefits available to her.

In other words, this Court does not necessarily have to reach the academic question of whether med pay is covered under § 768.76, under the facts and circumstances of this particular case, especially where this is an automobile accident claim. But the Court may wish to use this opportunity to clarify for the benefit of bench and bar, what is deductible and what is not deductible under § 768.76. The bottom line still is however, the Final Judgment in this case must be reversed and amended to deduct all collateral sources as required and the entry of a Final Judgment for the Appellant.

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III. TRIAL COURT ERRED IN FAILING TO DEDUCT WORKERS' COMPENSATION BENEFITS PAID, WHICH AS A MATTER OF LAW, MUST BE SET-OFF AGAINST THE VERDICT AND THE FINAL JUDGMENT BELOW MUST BE REVERSED AND ENTERED FOR ALLSTATE.

The final error made by the trial court below was in failing to make any deductions whatsoever for the workers' compensation benefits used to pay all of the Plaintiff's past medical bills. The jury awarded $6,500 in past medicals, but the bottom line is that they were still all paid. Any payment for any amount of damages for past medical expenses is a duplication of benefits and clearly improper under Florida law. Therefore, once again the Final Judgment must be reversed. Fourth District case law directly on point required such a set-off, so the Fourth District did not even mention anywhere the workers' compensation set-off claim. By totally ignoring this issue, the court did not have to deal with its own case law on this subject. Perhaps the Fourth District decided that since the ultimate result would be no PIP deduction at all, this legal question did not have to be decided. However, this set-off was required and could not be swept under the rug by the Fourth District's "payable" analysis. These benefits were paid.

Just like the PIP statute precludes a claimant from recovering PIP benefits paid or payable in an automobile accident, the same exact rationale applies requiring the set-off for workers' compensation benefits from uninsured motorist coverage to prevent the duplication of benefits. In other words,

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if the plaintiff has already received workers' compensation benefits for medical bills or lost wages, the plaintiff is not entitled to recover this amount of money again from their underinsured motorist carrier, even in the Fourth District. Florida Farm Bureau Casualty Co. v. Andrews, 369 So. 2d 346 (Fla. 4th DCA 1978).

In Andrews the court held that uninsured motorist carrier is entitled to treat its coverage as excess over any third party benefits, such as workers' compensation and recovery against insurance held by a tortfeasor and the uninsured motorist carrier is entitled to a set-off for those benefits. The Fourth District stated that is was clear that the law of Florida, as provided by the legislature, was that underinsured motorist coverage was to be treated as excess over any third-party benefits such as workers' compensation, PIP and the tortfeasor's insurance. Andrews, 347-348. The court held the language was not ambiguous in the statute because the statute used the phrase "shall be excess over" and "but shall not duplicate" those other benefits available. Andrews, 348. Going back to Dewberry it held that, under that Supreme Court decision, the underinsured motorist carrier is entitled to deduct from its liability the amount of those other third-party benefits received by its insured. Andrews, 348. On rehearing, the court went a step further and clarified its opinion that included in a set-off was workers' compensation benefits. Andrews, 348. The court came to the same decision in United States Fidelity & Guaranty Company v. Waln,

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395 So. 2d 1211 (Fla. 4th DCA 1981), again holding that the uninsured motorist carrier was entitled to a set-off against the available coverage, the amount of workers' compensation insurance actually paid to the insured as duplicate benefits, but the insured in that case was given the opportunity to pursue other damages such as pain and suffering. In the present case, there was no pain and suffering award because the Plaintiff did not sustain a permanent injury and the trial court clearly erred as a matter of law in failing to deduct the workers' compensation payment for all the Plaintiff's past medical bills and making Allstate pay for them again.

In Waln the Fourth District adopted the rationale of the First District in Carter v. Government Employees Insurance Company, 377 So. 2d 242 (Fla. 1st DCA 1979), that the set-off would even include future workers' compensation benefits. Waln, 1215. This was then modified by the court's statement that the set-off should only be for those benefits actually covered by workers' compensation, and the appellee should be given an opportunity to prove other damages such as pain and suffering, an issue irrelevant in the present situation. Waln, 1215.

Along the same lines in Lobry v. State Farm Mutual Automobile Insurance Company, 398 So. 2d 877 (Fla. 5th DCA 1981), the Fifth District also held that it was proper to deduct from uninsured motorist coverage, payments made by either workers' compensation carrier and these were properly set-off because, if not allowed, the plaintiff would receive in effect duplicate

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benefits contrary to the uninsured motorist statute. Lobry, 880. The only amount disallowed as a set-off was $12,000 in past medical expenses and the only reason was because the arbitrators did not consider these past medical bills when they made the award to the plaintiff. Therefore, this amount could not be set off because it would not constitute a duplication in the plaintiff's award. Lobry, 880.

Applying the rationale in these cases would require that the trial judge deduct from the amount of the jury's award, the $6,500 in past medicals already paid by the workers' compensation carrier. This would leave Rudnick with $15,000 in future medicals. Since $3,000 of the Plaintiff's PIP coverage was used to pay off the workers' compensation carrier's subrogation lien, this left $12,000 in PIP and med pay coverage. Subtracting the $12,000 in available PIP and med pay benefits from the $15,000 in future medicals, leaves a balance of $3,000. From the $3,000 the court must subtract the $10,000 settlement with the tortfeasor, again resulting in a judgment of zero dollars for the Plaintiff, the same exact result under Points I and II. The trial court erred as a matter of established law in refusing to allow any set-off for the paid past medical bills by the workers' compensation carrier. The Opinion below must be quashed. The Opinion in Kokotis approved. The Final Judgment reversed and a judgment entered for Allstate.

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CONCLUSION

The trial court erred as a matter of established law in failing to reduce the Plaintiff's award by the required collateral source set-offs for PIP, med pay and workers' compensation benefits. The Opinion below must be quashed. The Final Judgment reversed and a judgment entered for Allstate.

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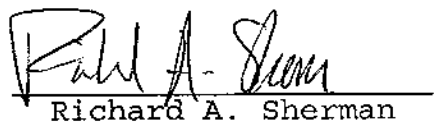
By: 
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