IN THE SUPREME COURT OF FLORIDA

CASE NO.: Sc02-2659
DCA Case No.: 1D01-4606
Florida Bar No.:320854

CYNTHIA CLEFT NORMAN, as
Personal Representative of the
Estate of WILLIAM CLEFT, deceased,

Petitioner,

v.

TERRI LAMARRIA FARROW,

Respondent.
_____/

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**ON PETITION FOR DISCRETIONARY REVIEW**
**FROM THE FIRST DISTRICT COURT OF APPEAL**

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# AMICUS BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF PLAINTIFF/ RESPONDENT

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PER LEAVE OF COURT

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## PREFACE

In this brief, Petitioner, Cynthia Cleff Norman, as Personal Representative of the Estate of William Cleff, deceased, shall be referred to as the "Defendant ". Respondent , Terri Lamarria Farrow, shall be referred to as the "Plaintiff". Amicus Curiae, The Academy of Florida Trial Lawyers, shall be referred to as "The Academy".

## POINT ON APPEAL

THE DECISIONS OF THE FIRST DISTRICT IN THE PRESENT CASE AND THE FOURTH DISTRICT IN *Langel,* CORRECTLY HOLD THAT A TORTFEASOR RECEIVES A SET-OFF PURSUANT TO FL. STAT. 627.736 ONLY FOR THAT PERCENTAGE OF NO-FAULT BENEFITS PAID TO AN INJURED PLAINTIFF DUE TO INJURIES CAUSED BY THE TORTFEASOR'S NEGLIGENCE

## AMICUS CURIAE

The Academy is a voluntary state-wide association of more than 4,000 trial lawyers concentrating on litigation in all areas of the law.

Members of the Academy are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. The Academy has been involved as amicus curiae in hundreds of cases in Florida District Courts, as well as this Court.

The Academy believes this case involves an issue of general application and significance because of the broad based impact it has on all personal injury cases arising out of automobile accidents where PIP benefits were paid.

## SUMMARY OF ARGUMENT

The trial Court, and the First District below, were correct in limiting the tortfeasor's set-off by utilizing the mechanism of only setting off those PIP benefits caused by the tortfeasor's negligence, and not those caused by the Plaintiff's comparative negligence. This is consistent with longstanding Florida decisional and statutory law, which abrogated the common law collateral source rule, and permits set-offs only to the extent necessary to prevent a duplication of benefits/double recovery by the Plaintiff.

Where the Defendant herein stipulated with the Plaintiff to avoid the statutory scheme in Florida Statute 627.736 which requires the jury not to even award PIP benefits in the gross verdict, the Defendant, who has the burden of proving entitlement to a set-off, should not be allowed to protest where the court has fashioned a mathematical calculation which comports with the result obtained by the statutory method. The 5th District in *Assi* was incorrect in that its mathematical calculation failed

to limit the set-off permitted in favor of the Defendant to prevent only a double recovery.



## ARGUMENT

### THE DECISIONS OF THE FIRST DISTRICT IN THE PRESENT CASE AND THE FOURTH DISTRICT IN *Langel*, CORRECTLY HOLD THAT A TORTFEASOR RECEIVES A SET-OFF PURSUANT TO FL.STAT. 627.736 ONLY FOR THAT PERCENTAGE OF NO-FAULT BENEFITS PAID TO AN INJURED PLAINTIFF DUE TO INJURIES CAUSED BY THE TORTFEASOR'S NEGLIGENCE

The Defendant argues that reducing the set-off, to which a tortfeasor is entitled under FL. Stat. 627.736, by that percentage that the verdict was reduced due to comparative negligence (or, arguably, percentage of negligence of any other party not allocated to the tortfeasor), contradicts the conceptual basis of the PIP statute by introducing the concept of fault into the no-fault scheme. This argument completely misconstrues both the underlying basis of the no-fault scheme and the long standing statutory and decisional themes behind the law of this state regarding set-offs to which a tortfeasor may be entitled.

As part of the trade-off which dictated this Court's determination in *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974). that the no-fault enactment was

constitutional was that persons injured in automobile accidents were assured a swift recovery, or as this Court in *Chapman v. Dillon*, 415 So. 2d 12 at 17 (Fla. 1982), observed, "an injured person will receive prompt payment for his major and salient economic losses, even where he himself is at fault" .



It is in this intended quick payment of benefits by the PIP insurer that the concept as to whether or not the insured receiving benefits was at fault is irrelevant under the statutory scheme, not in the Law of Florida as it pertains to set-offs.

The District Court below, and the Fourth District in *Aetna Casualty & Surety Company v Langel,* 587 So. 2d 1370(4th DCA 1991) correctly applied the concept of comparative negligence in determining the amount of set-off that the tortfeasor was entitled to only because it was necessary to ensure the set-off was **limited** to the extent necessary to avoid a duplication of benefits to the Plaintiff i.e. to preclude the Plaintiff a double recovery.

This is consistent with the theory behind the application of the law regarding tortfeasor set-offs in Florida, under many different circumstances, by the District Courts and this Court.

It has been so held in other cases involving set-offs of PIP benefits:

"The purpose of a set-off is to *avoid duplication of benefits*. See e.g., *Galante v. USAA Cas. Ins. Co.*,695 So.2d 456 (Fla.4th DCA 1997); *Allstate Ins.Co. v. Piatt,* 417 So. 2d 705 (Fla. 3d DCA 1982). It is the

burden of the party seeking in the set-off to prove the existence of an actual *duplication of benefits* in fact. *Galante,* 695 So. 2d at 457." *Pate v. Renfroe,* 715 So. 2d 1094. (1st DCA, 1998)(emphasis supplied)

" The purpose of such set-off is to prevent a plaintiff from obtaining a *double recovery*, i.e., receiving as damages sums for which PIP benefits were paid. 627.736 (3), Fla. Stat." *McKenna v. Carlson,* 771 So. 2d 555 (5th DCA 2000). (emphasis supplied)



"The purpose of allowing a set-off is to prevent duplication of benefits" *Hartford Accident and Indemnity Company v. Lackore,* 408 So. 2d 1040 at 1042 (Fla. 1982)

It has been so held in cases involving set-offs of health insurance benefits:

"The direct purpose and effect of the statute is to prevent *double recovery* by plaintiffs of collateral source payments in personal injury suits arising from motor vehicle accidents. Under its terms, the plaintiff continues to claim full damages but the jury is instructed to subtract any collateral source payments from its damages verdict. There is no question that the statute is applicable to Tyson and bars *double recovery*." *Blue Cross and Blue Shield of Florida Inc. v Matthews*, 498 So 2d 421 (Fla. 1986) (emphasis supplied).

This is exactly the same reasoning used in the 4th District in *Langel*, which characterized both PIP and med pay as "collateral sources", where the underlying criteria for allowing a set-off was to preclude a duplication of benefits:

"By a parity of reasoning, however, the trial court was wrong in disallowing a set-off for PIP and medpay, which in any case were "collateral sources," pursuant to 627.7372. The total jury award logically must have included the most basic elements of damages such as those for which PIP and medpay are payable in the first place. Again, the "common sense" test employed in *Fulton* demonstrates duplication of

> damages awarded by the jury. PIP and medpay therefore should have been set off as collateral sources.
>
> In calculating the exact amount of the set-offs, however, both the settlement amount and the PIP and medpay should be reduced by 10%. Because of Edward's comparative negligence, his total award was reduced by that percentage and thus, to that extent, *the foregoing payments were not duplicative*. *Centennial Ins. Co. v. Fulton*." *Aetna Casualty & Surety Company v. Langel*, 587 So.2d 1370 (4th DCA 1991).(emphasis supplied).



Of course, this court has now held in *Rollins v. Pizzarelli*, 761 So. 2d 294 (Fla. 2000), that PIP set-offs to which a tortfeasor may be entitled are governed by Florida Statute 627.736, and not the general automobile collateral source rule in Fla.Stat. 627.7372 (now Fla. Stat. 768.76) .

Nevertheless, this court in *Rollins*, followed the traditional set-off rule by disallowing set-offs of future benefits to which the Plaintiff might be entitled to under PIP be allowed because those benefits would **not necessarily** constitute a double recovery of the amount the jury verdict awarded against a tortfeasor, to wit:

> "In discussing the provisions of section 627.737 (3) in effect at that time, we stated that "[t]o prevent the injured persons from receiving double recovery, the legislature has provided that any PIP benefits they *have received* from their insurers will be set off from the amount they are entitled to recover from the tortfeasor." *Purdy*, 403 So. 2d at 1329." *Rollins*, 761 So. 2d at 300 (emphasis in original)

This Court further held, in *Rollins*, that statutory set-off schemes such as 627.736, are in derogation of the common law of Florida and should be narrowly construed in favor of the injured Plaintiff, to wit:

> "An additional and important canon of statutory construction applicable in this case, is that statutory provisions altering common-law principles must be narrowly construed. *See Ady v. American Honda Fin. Corp.*, 675 So. 2d 577, 581 (Fla. 1996). Both PIP benefits and medpay benfits are collateral sources, that is, first-party benefits for which the insured has paid a separate premium. The common-law rule prohibited both the introduction of evidence of collateral insurance benefits received, and the set-off of any collateral source benefits from the damage award. *See Gormley v. GTE Prods. Corp.*, 587 So. 2d 455, 457-59 (Fla. 1991).



> As an alteration of the common law, the statutory provisions that allow the introduction into evidence and setoff of collateral insurance benefits must be narrowly construed." *Rollins*, 761 So. 2d at 300.

It is not only in the PIP context that the Florida courts have held that set-offs to the benefit of the tortfeasor, are only allowable to the extent of preventing the Plaintiff a double recovery/duplication of benefits. In a case involving the UM statute, 627.727, and its requirement that the insureds' recovery "shall not duplicate the benefits available to an insured..." and a set-off based upon worker's compensation benefits, the 3rd DCA has held:

> "Insofar as the duplication issue is concerned, there is every indication-and no reason to believe otherwise-that the arbitrators necessarily included the most basic elements of damages, that is, lost wages and medical expenses, in their assessment of *Fulton's* "total" damages of over a million dollars. Any question that this was true is thoroughly dissipated by the fact that the award *did* specifically exclude claimed "economic losses to [the claimants']corporate enterprises," thus showing by negative implications that the comp payments were not excluded. [FN2]. In fact, not even the appellees affirmatively suggest with a straight face that the amount of *Fulton's* award does not include the items covered by the compensation payments. Under these circumstances, we must hold that the insurer established at least prima facie that a

> duplication indeed occurred..” *Centennial Insurance Company v. Fulton*. 532 So. 2d 1329 at 1331 (3rd DCA 1988)
>
> “As to the merits of the proper calculation of the amount, if any, to be set off against the award if the trial court so rules after this hearing, we reemphasize that 627.727(1) allows a deduction only of the amounts for which the claimant has already received compensation. (Citations omitted)” *Centennial Insurance Company v. Fulton* 532 So. 2d at 1332.



Of course, the way these set-offs are calculated for workers’ compensation benefits is instructive in PIP situations, since like PIP, workers’ compensation is paid to the injured claimant without regard to fault on the claimant’s part, and also without regard to how many different tortfeasors’ negligence combined to cause Plaintiff’s injury. As such, the *Centennial* court clearly held that the tortfeasor was **not** entitled to set off from the verdict, those portions of the compensation benefits which were related to Plaintiff’s own comparative negligence, to wit:

> “ In the present instance, we believe-since Fulton did not receive 75% of those benefits from the UM carrier by virtue of his comparative negligence, and the award did not, to that extent, “duplicate” the compensation benefits-that the reduction should be 25% of any duplicate workers’ comp. payments.” *Centennial Insurance Company v. Fulton*, 532 So. 2d at 1332.

The same theme permeates set-offs under Florida’s general collateral source Statute, Section 768.76 (formerly 627.7372). Once again, the Florida legislature intended that a duplication of benefits is not permitted. *Blue Cross and Blue Shield of Florida, Inc.*

*v. Matthews,* 498 So.2d 421 (Fla. 1987).

Unfortunately, as pointed out by the Plaintiff in her brief, confusion has ensued because the legislature changed the mechanism of the set-off calculation from 627.7372, which instructed the jury not to award damages which were reimbursed by collateral sources, to 768.76, where the jury awards damages, but a court later reduces the verdict by the amount of duplicated benefits.



Section 627.7372 (1), Florida Statutes (Supp.1992) provided:

> (1) In any action for personal injury or wrongful death arising out of the ownership operation, use, or maintenance of a motor vehicle, the court shall admit into evidence the total amount of all collateral sources paid to the claimant, and the court shall instruct *the jury to deduct* from its verdict the value of all benefits received by the claimant from any collateral source. (emphasis supplied).

Section 768.76(1), Florida Statutes (2001) provides:

> (1) In any action to 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 the claimant, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists. Such reduction shall be offset to the extent of any amount which has been paid, contributed, or forfeited by, or on behalf of, the claimant or members of the claimant's immediate family to secure her or his right to any collateral source benefit which the claimant is receiving as a result of her or his injury. (emphasis supplied)

Nevertheless, the legislative intent of precluding recovery by the injured

Plaintiff, of only those benefits which are duplicated, is clearly seen by the provisions of 768.76 which indicates that there is no set-off for benefits such as health insurance, where the insurance company has a right of subrogation against the tortfeasor. Of course, if the benefits recovered from the tortfeasor by the Plaintiff have to be repaid to his/her insurance company to satisfy the right of subrogation, there is no duplication of benefits. Once again, it is the tortfeasor's burden to establish his right to a set-off by



demonstrating a duplication of benefits, as it is the subrogating carrier's burden to establish that the jury awarded damages based upon medical bills which were paid for by that carrier's benefits.

Consistent with the other courts, the 5th District in *Sutton v Ashcraft*, 671So. 2d 301(5th DCA 1996) in accordance with Florida Statute Sec. 768.76 and a set-off claimed due to the collateral source of health insurance ( because Plaintiff purchased the right to subrogation from the insurer), held that the collateral source set-off is to be reduced by the percentage of the plaintiff's comparative negligence (30% in that case), to wit:

> "It limits the right of reimbursement to the amount actually recovered by the Plaintiff from the tortfeasor (in this case 70%), less an allowance for the plaintiff's attorney's fees in obtaining a judgment for medical expenses.
>
> ***
>
> The statute contemplates that collateral sources which are of the sort that give rise to a right of reimbursement or subrogation should not be charged against the plaintiff except to the extent they are recovered by him."
> *Sutton v Ashcraft*, 671 So. 2d at 303.

Of course, that is all the legislature has done in the PIP statute 627.736. Under 627.736 the duplication of benefits is prevented by **not even allowing** the jury to award those damages for which benefits have been paid, to wit:

> " 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 provisions of ss. 627.730-627.7405, or his



> or her 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 or her 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." Fla. Statute 627.736(3) (1997). (emphasis supplied)

In other words, the jury, or the judge in cases where the judge is the trier of fact, receives evidence of the total amount of special damages suffered by the Plaintiff, but to avoid a duplication of benefits, makes a deduction of those duplicated benefits from the final amount which is awarded to the Plaintiff. Of course, this gross verdict against the tortfeasor is then reduced by the percentage of the Plaintiff's comparative negligence, as well as any percentage of the total damages which is caused by another tortfeasor, pursuant to Fla. Statute 768.81, to arrive at the net verdict.

However, in this case, the parties **stipulated** that the set-off was to be done post-trial **by the court**. Contrary to the assertions of the Defendant in its initial brief, the Academy asserts that this stipulation is common practice for trial counsel in this state for various reasons. One, reason may indeed be the confusion in the Standard Jury Instructions as pointed out by the Plaintiff's Brief, however, trial counsel may have other reasons for making the stipulation. For example, Plaintiff's counsel normally fears that the jury will not



seriously consider as damages injuries related to medical treatment for which the Plaintiff is not out of pocket, as well as the intangible damages relating thereto. This fear is a basis for the common law collateral source rule which is discussed above.

Moreover, Defense trial counsel is concerned, in accordance also with general Florida Law, to avoid all mention of any type of insurance to the jury to, of course, preclude the jury from speculating concerning the existence of a defendant's liability insurance.

This court has now accepted jurisdiction to determine the issue as to whether a tortfeasor may, absent stipulation by the Plaintiff, avoid the statutory requirement under Florida Statute 627.736, that the trier of fact hear evidence of the collateral sources and be instructed not to award those amounts in its verdict. *Caruso v.Baumle*, 835 So. 2d 276 (Fla. 2003), review granted 2003WL 22052195 (Fla. August 26, 2003).

Although the above stipulation is common practice, it should be pointed out that the burden of asserting and proving a set-off is upon the tortfeasor, *see Galante* and *Pate*, and by stipulating to avoid the statutory scheme to ensure that there is no duplication in the verdict of PIP benefits paid or payable, the Defendant herein should not be permitted to protest where the court has, post verdict, by reducing the amount of PIP set-off by the percentage of comparative negligence, created a set-off which is the mathematical equivalent of the set-off which would have been created if the Defendant had followed the statutory scheme.



This is a matter more of mathematics than law and has been well addressed in the Plaintiff's Brief, using excellent examples, at pages 9 and 11.

The Academy sees no need to reiterate the math herein but would once again stress, that the trial court, the First District below, the 4th DCA in *Langel*, and in the 3rd District in *Centennial,* have all performed the math in such a way as to effectuate the long standing rule regarding collateral source set-offs, which is to eliminate a duplication of benefits. However, the case upon which Defendant relies, *Assi v. Florida Auto Auction of Orlando Inc.*, 717 So. 2d 588 (5th DCA 1998) fails both the mathematical and legal standard, in that when it reduces the gross verdict by the Plaintiff's comparative negligence **prior** to reducing by the **full** $10,000.00 PIP benefits, it is not reducing the **total** economic

damages by those damages which were reimbursed (duplicated) by PIP benefits, but is instead reducing a lesser net verdict based upon the amount of the total economic damages multiplied by the percentage of tortfeasor's negligence. As such, the Courts' calculation in *Assi* is a windfall to the tortfeasor, and comports neither with Fla. Statute 627.736, nor the legal underpinnings behind permitting the tortfeasor a set-off of duplicate benefits under the numerous circumstances and statutes created by the legislature's abrogation of the common law collateral source rule.



## CONCLUSION

The Academy urges this Court to affirm and approve the decision below, along with *Langel*, and disapprove *Assi*, as it misinterprets both Florida Statute 627.736 and the precedent of numerous Florida courts, including this court involving the law of set-offs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that true and correct copy of the foregoing has been furnished by furnished by U.S. Mail this_____day of _____2003, to Daniel M. Soloway, Esquire & Robert T. Bleach, Esquire at 901 Scenic Highway , Pensacola, Florida 32503; Linda H. Wade, Esquire at Schofield & Wade and The Law Offices of Richard A. Sherman, P.A. at 1777 South Andrews Ave., Suite 302, Ft. Lauderdale, Florida 33316.

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CERTIFICATE OF COMPLIANCE

**I HEREBY CERTIFY**, that the brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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