IN THE SUPREME COURT OF FLORIDA

CASE NO.:Sc02-2659
DCA Case No.: 1D01-4606
Florida Bar No.: 508942

CYNTHIA CLEFF NORMAN, as Personal Representative of the Estate of WILLIAM CLEFF, 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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**BRIEF OF RESPONDENT ON THE MERITS**
TERRI LAMARRIA FARROW

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## POINT ON APPEAL

THE DECISION OF THE FIRST DISTRICT IN THE PRESENT CASE CORRECTLY HOLDS THAT A TORTFEASOR RECEIVES A SET-OFF ONLY FOR THAT PERCENTAGE OF NO-FAULT BENEFITS PAID TO AN INJURED PLAINTIFF PURSUANT TO FL.STAT. §627.736 DUE TO INJURIES CAUSED BY THE TORTFEASOR'S NEGLIGENCE

## SUMMARY OF ARGUMENT

The First District correctly held that Defendant's[1] PIP setoff under Fla.Stat. §627.736(3) should be reduced by the percentage of Plaintiff's comparative negligence. Therefore, its decision should be affirmed.

The undisputed purpose of the PIP setoff under Fla.Stat. §627.736(3) is to prevent plaintiffs from receiving a double recovery. Plaintiff did not receive a double recovery of any benefits in the instant case. Defendant received a 10% reduction in Plaintiff's total damages award due to a reduction for Plaintiff's comparative fault, and a further setoff for 90% of the PIP benefits which were paid or payable. This resulted in a 100% setoff for PIP benefits paid or payable to Plaintiff.

Both the plain meaning and legislative intent of Fla.Stat. §627.736 support the lower court's decision. Fla.Stat. §627.736(3) clearly states that the jury is to hear evidence of PIP benefits paid or payable, and is not to award Plaintiff damages for which benefits have been paid. The jury's reduction of the plaintiff's damages award under this provision takes place prior to the court's reduction of the award due to the plaintiff's comparative fault. While the parties in this case

[1] The terms "Plaintiff" and "Defendant" will be used to describe the parties throughout this brief for the sake of clarity.

allowed the court, and not the jury, to apply the PIP setoff, the court's reduction of the PIP setoff by the amount of Plaintiff's comparative fault resulted in the same judgment which would have been rendered had the jury made the reduction before comparative fault was applied. Therefore, the lower court's ruling was in accordance with the plain meaning of the statute.

The lower court's ruling also followed the legislative intent of the statute. The intent of Fla.Stat. §627.736(3) is to prevent Plaintiff from receiving a double recovery, not to provide a windfall for the tortfeasor. When a plaintiff's award is reduced for comparative negligence, she is already precluded from recovering a portion of her damages, some of which were paid for by PIP benefits. Therefore, any PIP setoff to which a tortfeasor is entitled should be reduced to reflect the amount already subsumed in the reduction for the plaintiff's comparative fault. To hold otherwise would give the tortfeasor a double setoff.

For purposes of calculating a PIP setoff, the degree of fault of all parties must be considered. For example, if two defendants are actively negligent and are not jointly and severally liable for the plaintiff's economic damages, the PIP setoff must be divided among them. It stands to reason that this

division would be based on their percentage of fault, resulting in defendants only receiving the percentage of the PIP setoff caused by their own negligence. Accordingly, when a Plaintiff receives PIP benefits due to injuries which were caused in part by her own negligence, the defendants should not receive a setoff for that portion of benefits paid. “No-Fault” does not mean “no apportionment of fault” for purposes of calculating a PIP setoff.

Defendant argues that Fla.Stat. §627.737(1) requires that he be allowed a PIP setoff without regard to fault. However, the “exemption” from liability for certain damages found in this section only applies in the absence of a permanent injury. Plaintiff suffered a permanent injury, making this section inapplicable. In any event, this section provides no greater a setoff than that found in Fla.Stat. §627.736(3).

The district court in the instant case chose to follow the Fourth District’s opinion in *Aetna Cas. & Surety Co v. Langel, infra* over the Fifth District’s opinion in *Assi v. Florida Auto Auction, infra.* The *Langel* opinion was a logical extension of this Court’s precedents, while the *Assi* opinion cited as support a case from this Court involving neither no-fault benefits nor comparative fault.

The decision of the First District in the instant case

should

be affirmed. Tortfeasors are only entitled to a PIP setoff based on their pro rata share of fault.

## ARGUMENT

THE DECISION OF THE FIRST DISTRICT IN THE PRESENT CASE CORRECTLY HOLDS THAT A TORTFEASOR RECEIVES A SET-OFF ONLY FOR THAT PERCENTAGE OF NO-FAULT BENEFITS PAID TO AN INJURED PLAINTIFF PURSUANT TO FL.STAT. §627.736 DUE TO INJURIES CAUSED BY THE TORTFEASOR'S NEGLIGENCE

### I. Standard of Review

This sole issue in this appeal is a question of statutory interpretation, a pure question of law. Therefore, the standard of review is *de novo*. *See Armstrong v. Harris*, 773 So.2d 7, 11 (Fla. 2000).

### II. The trial and district courts' rulings that Defendant's PIP setoff should be reduced by the percentage of Plaintiff's comparative negligence do not provide Plaintiff with a double recovery

Florida's no-fault insurance system requires that no-fault insurers pay certain medical and disability benefits to a driver involved in an automobile accident, regardless of whether that driver was partially or completely at fault for the accident. *See* Fla.Stat. §§627.730-627.7405. This system presumes that insurers will pay no-fault benefits for damages caused by the driver's own negligence. The no-fault system also provides that when a driver sues another for injuries sustained in an automobile accident, that driver is not entitled to recover any damages for which no-fault benefits were paid or are payable.

Fla.Stat. §627.736(3). The purpose of this provision is to prevent a Plaintiff from receiving a double recovery. *See Purdy v. Gulf Breeze Enterprises, Inc.*, 403 So.2d 1325, 1329 (Fla. 1981).

In the instant case, the First DCA correctly held that because 10% of Plaintiff's no-fault benefits were paid due to her own comparative fault, for which Plaintiff would receive no recovery, Defendant's PIP setoff should be only 90% of the total amount of PIP benefits paid. *See Norman ex rel. Estate of Cleff v. Farrow*, 832 So.2d 158 (Fla. 1st DCA 2002). This decision perfectly follows both the plain language and intent of the PIP statute, in that Plaintiff did not recover from Defendant any damages for which PIP benefits were paid or payable.

Defendant received a setoff for 90% of the PIP benefits paid as an explicit PIP setoff. The remaining 10% of the PIP benefits paid were subsumed in the court's reduction of the jury's verdict pursuant to the finding Plaintiff's 10% comparative fault. Therefore, the court's reduction of the verdict by Plaintiff's 10% comparative fault, coupled with the setoff for 90% of all PIP benefits paid, ensured that Plaintiff did not recover any damages for which personal injury protection benefits were paid or payable. Both the plain meaning and intent of Fla.Stat. §627.736 were met by the trial and district courts'

rulings.

## III. **“No-Fault” does not mean “no apportionment of fault” for purposes of calculating a PIP setoff**

The fundamental misconception at the heart of Defendant’s argument is the presumption that “no fault” benefits allow for no apportionment of fault for purposes of calculating the setoff to which a defendant is entitled. In reality, the “no fault” concept applies only to the payment of benefits by the insurer to the insured, not to the application of a setoff for these benefits in a liability case. This is made clear when one considers how the setoff would be applied in a case involving two active tortfeasors (such as a three-car collision). Assuming that the two defendants are not jointly and severally liable for the plaintiff’s economic damages,[2] the court must apportion the PIP setoff among the parties. The only logical distribution of the setoff would be based upon each party’s percentage of fault. When two active tortfeasors are involved in an automobile accident, apportionment of the PIP setoff may be a necessity. If apportionment of the PIP setoff among defendants is appropriate, it must follow that when a Plaintiff is partially at fault for her own injuries, part of the PIP setoff should be apportioned

[2] Under Fla.Stat. §768.81 (3)(c), defendants who are assigned a lower percentage of fault than the plaintiff are not jointly and severally liable for the plaintiff’s economic damages.

to her, as well. Therefore, Defendant is entitled to a PIP setoff only for that percentage of PIP benefits paid due to his own negligence. The First District correctly reduced Defendant's PIP setoff to 90% of all PIP benefits paid, because only 90% of these benefits were paid due to Defendant's negligence. The other 10% were paid due to Plaintiff's negligence, and Plaintiff would not recover these benefits either.

## IV. **The District Court's ruling is in accordance with the legislative intent of Fla.Stat. §627.736**

Defendant claims that the District Court's reduction of the PIP setoff by the percentage of Plaintiff's comparative fault was contrary to legislative intent. The plain language of the PIP statute contradicts this, and the legislative history of the statute, coupled with the way the PIP statute fits into the framework of other statutes dealing with damages, demonstrates that the District Court acted properly. The legislative intent behind Fla.Stat. §627.736 can be divined from both its plain language and legislative history. "[W]hen the statutory language is clear, legislative history cannot be used to alter the plain meaning of the statute. However, when the statutory language is susceptible to more than one meaning, legislative history may be helpful in ascertaining legislative intent." *Rollins v. Pizzarelli*, 761 So.2d 294, 299 (Fla. 2000) (citations omitted).

Both the plain language of the PIP statute and its legislative history support the District Court's ruling.

### A. The plain language of Fla.Stat. §627.736 supports the District Court's ruling

The plain language of Fla.Stat. §627.736(3) states as follows:

> **(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 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.*

(emphasis added). The statute clearly states that the jury[3] is to hear evidence of all the plaintiff's special damages, but that it is not to award damages for which PIP benefits are paid or payable. The clear intention of this provision is to have the jury apply the PIP setoff by reducing its damages award by the

[3] Or the judge, if it is a bench trial.

amount of PIP benefits paid or payable.[4] The jury's determination of the total amount of damages takes place prior to the court applying the jury's apportionment of fault among the plaintiff and defendant(s).[5] Therefore, the plain meaning of the statute envisions the jury applying a PIP setoff to the total damages award *prior* to the court reducing the award by plaintiff's comparative fault. This is the mathematical equivalent of what the trial court and First District did in the instant case, as demonstrated by the examples below:

> **Common Facts:** Fault is apportioned at Plaintiff-20%/Defendant-80%, Plaintiff has $15,000.00 in medical specials, and has received $10,000.00 in PIP benefits.
>
> **Ex. 1 (what the trial court did in the instant case)**- The jury makes no reduction in its verdict for PIP benefits received by Plaintiff, but the trial court reduces Defendant's PIP setoff by the amount of Plaintiff's comparative negligence:

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[4] This Court has accepted *certiorari* review of *Caruso v. Baumle*, SC03-127, which specifically addresses the issue of whether a Defendant must present evidence at trial of PIP payments made in order to be awarded a set-off.

[5] Pursuant to Fla.Stat. §768.81(3), the court is to determine the apportionment of damages at the time judgment is entered. This takes place after the jury fills out the total amount of damages on the verdict form, reduced by PIP benefits received.

$15,000.00 (total damages)

-$ 3,000.00 (Plaintiff's 20% comparative fault)

-$ 8,000.00 ($10,000 PIP - 20% comparative fault)

=$ 4,000.00 (Judgment for Plaintiff)

**Ex. 2 (what the legislature intended)** - The jury reduces the verdict by the amount of PIP benefits Plaintiff received:

$5,000.00 (total damages - PIP benefits paid)

-$1,000.00 (Plaintiff's 20% comparative fault)

=$ 4,000.00 (Judgment for Plaintiff)

It is apparent that the result achieved by applying the plain language of the statute is the same as that achieved by the trial and district courts' method in the instant case. Both methods of achieving this result reduce the PIP setoff by the amount of the Plaintiff's comparative fault. Therefore, the plain language of the statute supports the First DCA's ruling.

In the instant case (and undoubtably in most other automobile accident cases accruing in Florida after October 1, 1993), the jury was not instructed to reduce its award by the amount of PIP benefits Plaintiff received. This common occurrence can likely be explained by an anomaly in the Florida Standard Jury Instructions for Civil Cases.[6] Prior to the October

[6] Hereafter referred to as "Standard Jury Instructions."

16, 1997 amendment to the Florida Standard Jury Instructions, Standard Instruction 6.13 stated that juries were to reduce a Plaintiff's damages awards by the amount of PIP benefits received.[7] *See* Fla. Std. Jury Inst. 6.13b. However, after the repeal of Fla.Stat. 627.7372 (effective for all cases accruing after October 1, 1993), the authors[8] of the Florida Standard Jury Instructions erroneously concluded that PIP setoffs were to be applied by the court, not the jury, under the general collateral source statute, Fla.Stat. §768.76. *See* Fla. Std. Jury Inst. 6.13a and 6.13b. The authors apparently overlooked the language in Fla.Stat. §627.736(3) which requires that such a reduction be done by the jury.[9] In *Sheffield v. Superior Ins. Co.*, 800 So.2d 197, 200 n.3 (Fla. 2001), this Court noted that Fla.Stat.

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[7] This jury instruction directly contradicts Defendant's unsupported assertion that the ruling in the instant case is contrary to the "routine manner" in which the PIP setoff has been "consistently applied" for the "last 27 years." (Appellant's Initial Brief, p.7). At least until October 16, 1997, the PIP setoff was consistently reduced by the amount of the plaintiff's comparative fault, as further explained later in this section.

[8] The Supreme Court Committee on Standard Jury Instructions.

[9] These instructions were approved by this Court in *Standard Jury Instructions – Civil Cases,6.13–Collateral Source Rule*, 700 So.2d 377 (Fla. Oct. 16, 1997). However, as this Court always notes in its approval of Standard Jury Instructions, "In doing so we express no opinion on the correctness of these instructions[.]"

§627.736(3) (jury reduction), and not Fla.Stat. §768.76 (judge reduction), applies to any reductions made for PIP benefits.

Had the trial court in the instant case not reduced the PIP setoff by Plaintiff's comparative fault, the outcome of the case would have given Defendant a windfall which he would not have received had the jury been instructed to apply the PIP setoff. This windfall can be demonstrated by a third example, using the same set of facts from the two prior examples:

> **Ex. 3 (demonstrates windfall to Defendant if the trial court does not reduce the PIP setoff by Plaintiff's comparative fault)** - the jury makes no reduction for PIP, and the trial court does not reduce the PIP setoff by Plaintiff's comparative fault:
>
> $15,000.00 (total damages)
>
> -$ 3,000.00 (Plaintiff's 20% comparative fault)
>
> -$ 10,000.00 ($10,000 PIP, not reduced by comparative fault)
>
> =$ 2,000.00 (Judgment for Plaintiff)

Instead of Plaintiff being awarded $4,000.00, as the legislature intended,[10] Plaintiff is only awarded $2,000.00, giving Defendant a $2,000.00 windfall.

The plain language of Fla.Stat. §627.736 requires that the

[10] As demonstrated by Example 2, *supra.*

PIP setoff be applied when the verdict is reached, prior to any reductions for comparative fault. The result of this order of calculations is the same as reducing the PIP setoff by the degree of Plaintiff's comparative fault. Therefore, the plain language of the PIP statute supports the trial court's reduction of the PIP setoff by the amount of Plaintiff's comparative fault.

### B. The legislative history of Fla.Stat. §627.736 supports the First DCA's ruling in the instant case

If this Court determines that the language of Fla.Stat. §627.736 is unclear, the statute's legislative history demonstrates the legislature's intent to limit the amount of a Defendant's PIP setoff to his pro rata share, based on degree of fault. The purpose of the PIP setoff is to ensure that Plaintiff does not receive a double recovery for medical and disability benefits paid by PIP. Prior to 1976, PIP insurers had a right of subrogation to recover benefits paid due to another driver's fault. If an insured received a judgment against a tortfeasor, the PIP insurer could recover certain benefits paid through "equitable distribution." The amount of the equitable distribution was determined by the court, and took into account, among other things, the insured's attorney's fees and costs expended to obtain the award. By providing for equitable

distribution, instead of full reimbursement, it is clear that the legislature's intent was to allow PIP insurers to recover only that pro rata share of PIP benefits paid due to a third party's negligence.[11] This would allow a plaintiff to keep the pro rata portion of PIP benefits paid due to the plaintiff's own comparative negligence, which is the same result achieved by the trial court and District Court in the instant case.

In 1976, the legislature changed the PIP law to provide a different means of preventing double recovery by the plaintiff. *See* Ch 76-266,§4, Laws of Florida. It eliminated the PIP insurer's right of subrogation, as well as equitable distribution. It replaced these with a provision that required the finder of fact in a liability suit to reduce the plaintiff's special damages by the amount of PIP benefits received. *See* Fla.Stat. §627.736(3). Defendant implies that because the legislature eliminated equitable distribution, it intended to provide defendants with a PIP setoff that exceeds their equitable share. This is not true.

As Defendant states in his brief, the legislature eliminated

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[11] Indeed, if the PIP insurer were allowed to recover those sums paid due to the insured's own negligence, the result would be ludicrous, and would defeat the entire purpose of PIP benefits. It would also be an example of an insurer trying to subrogate against its own insured, which is clearly not permitted.

equitable distribution, as it relates to PIP,[12] through its 1976 changes to the Fla.Stat. §627.736. Equitable distribution was an unwieldy system which generated a great deal of litigation[13] over how much an insurer was entitled to recover from the Plaintiff/insured after the Plaintiff's liability case was resolved. By eliminating the subrogation right of the PIP insurer and substituting the current system of setoffs for PIP benefits received, the legislature was able to achieve the goal of equitable distribution, i.e., no double recovery for the plaintiff, without generating any additional litigation. In *Purdy v. Gulf Breeze Enterprises, Inc.*, 403 So.2d 1325, 1329 (Fla. 1981), this Court recognized that the 1976 changes to the PIP statute "merely prevent injured plaintiffs from recovering monies which, *equitably speaking*, belong to their insurers" (emphasis added). This Court recognized that the principles of equity were not abandoned entirely by the 1976 amendment to

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[12] Equitable distribution appears alive and well for other collateral sources in Florida, however. *See* Fla.Stat. §768.76(5) (providing that in a dispute between a Plaintiff and a collateral source provider over reimbursement, the court may consider comparative fault and other equitable factors in determining the amount the provider can recover).

[13] Defendant cites 31 cases in his brief as being cases litigating the issue of equitable distribution. One of these cases, *Witko v. Liberty Mutual Ins. Co.*, 348 So.2d 52 (Fla. 4th DCA 1977) did not involve equitable distribution.

Fla.Stat. §627.736. *Id.* Only the means by which equity was achieved were changed.

It is noteworthy that the legislature rejected a proposal which would have eliminated equitable distribution, but would have required a Plaintiff/insured to reimburse the PIP insurer for all amounts received. (*See*, Petitioner's Notice of Filing Legislative History of Chapter 76-266, Laws of Florida, pp.85-86). Clearly, this rejection by the legislature evidences its intent to provide the Plaintiff with roughly the same recovery she would have received under equitable distribution, without her having to litigate with her PIP insurer. Had the legislature wanted Plaintiff's recovery to be reduced by the total amount of PIP benefits she received, regardless of equitable considerations, it would have enacted the rejected proposal for full reimbursement of the PIP insurer. By rejecting full reimbursement of the PIP insurer in favor of the PIP system under which we currently operate, the legislature indicated that it did not want a Plaintiff's recovery to be reduced by the full amount of PIP benefits paid if the recovery was also reduced by comparative fault. It wanted the equitable result achieved by the First District in the instant case.

## V. **The First DCA's ruling in the instant case is not a windfall for the Plaintiff**

The Plaintiff's recovery in the instant case is not a windfall. It is less than what the Plaintiff would have received under the pre-1976 equitable distribution system,[14] which the legislature enacted to prevent windfalls. *See Purdy*, 403 So.2d at 1328 (stating that the main purpose of equitable distribution was to prevent double recoveries). Plaintiff certainly did not receive a "double recovery." Contrary to what Defendant argues, it is mathematically impossible for Plaintiff to have received a double recovery of benefits in the instant case. Plaintiff's recovery was reduced by both a PIP setoff (90% of all PIP benefits paid) and by Plaintiff's 10% comparative fault, which included a 10% reduction in all medical bills paid by PIP. This results in a 100% setoff of all medical bills paid by PIP.

Contrary to Defendant's assertion, there is absolutely no incentive for plaintiffs to receive unnecessary medical treatment or to inflate their medical costs because of the First DCA's ruling. The plaintiff's comparative fault, coupled with the fact that PIP only pays 80% of her medical expenses, will always result in the plaintiff's out-of-pocket medical costs increasing as she receives more medical treatment. This is a disincentive for the plaintiff to receive unnecessary treatment.

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[14] Due to there being no reduction in the PIP setoff for attorney's fees and costs in obtaining the judgment.

This can be demonstrated by the following example:

**Facts**: Fault is apportioned at Plaintiff-20%/Defendant-80%, Plaintiff has $8,000.00 in medical specials and has received $6,400.00 in PIP benefits (80% of $8,000.00)

**Ex. 4 (demonstrates that Plaintiff's out-of-pocket expenses increase with cost of medical care, creating a disincentive to receive unnecessary care)** - The jury reduces the medical specials by the amount of PIP received by Plaintiff, and the court apportions fault:

$1,600.00 (jury damages, reduced for PIP)
-$ 320.00 (Plaintiff's 20% comparative fault)
=$1,280.00 (Judgment for Plaintiff)

As one can see, Plaintiff has to pay $320.00 of her medical bills out of her own pocket after the judgment is paid. If Plaintiff had received more medical care prior to trial, this out-of-pocket expense would be higher. For example, had Plaintiff incurred $10,000.00 in medical expenses, her out-of-pocket expenses would have increased to $400.00. These out-of-pocket expenses increase dramatically once Plaintiff's PIP benefits have been exhausted. Medical expenses of $20,000.00 would result in out-of-pocket expenses of $2,000.00. Clearly, the more Plaintiff "runs up" her bills, the more she herself has to pay. Therefore, there is no motivation for a Plaintiff to

incur unnecessary medical expenses, as there is no way for Plaintiff to profit by doing so.

Defendant provides an example on page 13 of his Initial Brief which purports to show how Plaintiff would receive a windfall if the PIP setoff is reduced by the Plaintiff's comparative negligence. The example assumes that the plaintiff is found to be 50% negligent for his own injuries, and has incurred $25,000.00 in medical bills, $10,000.00 of which were paid by PIP. Defendant argues that his proposed method of calculating the PIP setoff would result in Plaintiff recovering a combined total of $12,500.00 from PIP and the Defendant, "mesh[ing] perfectly with comparative negligence" because Plaintiff recovered 50% of his damages. Defendant also argues that Plaintiff's method of calculating a PIP setoff would result in a recovery of $17,500.00, or 70% of his damages, thus creating a windfall.

Defendant's argument breaks down, however, when the amount of damages awarded to the Plaintiff in the above example falls below $20,000.00. For example, if the plaintiff has medical bills of $18,000.00, $10,000.00 of which were paid by PIP, under Defendant's method of calculating the PIP setoff, the plaintiff would recover a total of $10,000.00 (combined) from PIP and the defendant ($18,000.00-$9,000.00 for comparative fault =

$9,000.00 - $10,000.00 PIP setoff = $0 from the defendant, but the plaintiff has still received $10,000.00 from PIP). This $10,000.00 is 55.5% of the plaintiff's damages, which is greater than the tortfeasor's 50% fault. Therefore, even Defendant's method of applying the setoff does not mesh perfectly with comparative negligence. It certainly does not mesh at all with the concept of comparative negligence when viewed from the perspective of what the tortfeasor pays. The tortfeasor, who is 50% at fault, pays only 10% of the plaintiff's medical bills under the Defendant's example, and pays 0% under the Plaintiff's example. It is clear which party is truly receiving the windfall from Plaintiff's PIP benefits. Defendant is essentially demanding an even bigger windfall than he is already receiving.

Neither Plaintiff's nor Defendant's PIP setoff methods mesh perfectly with comparative fault because PIP pays Plaintiff for injuries caused by Plaintiff's own negligence, a concept foreign to comparative fault. The very nature of no-fault benefits, which pay 80% of an injured party's medical bills, results in a "windfall" to that party if he is more than 20% at fault for his injuries, and a "windfall" to the tortfeasor in every case, because he now has to pay less than his fair percentage of the damages. This windfall should be equitably apportioned when calculating Defendant's setoff, as intended by the legislature,

and as done by the district court in the instant case.

## VI. **The "exemption" language in Florida Statute §627.737(1) is inapplicable to the instant case because Plaintiff suffered a permanent injury**

Defendant cites to Fla.Stat. §627.737 as alleged support that the trial court in the instant case erred. Defendant quotes only the part of the statute which provides that tortfeasors covered by the required insurance under Fla. Stat. Ch. 626 are "exempt" from tort liability to the extent that PIP benefits are payable for the injuries. Notably absent from Defendant's quotation is the part of the statute which makes it clearly inapplicable to the instant case. Fla.Stat. §627.737(1) is cited in full below, with the pertinent portion Defendant omitted from his brief highlighted in bold:

> (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 her or his acts or omissions, is hereby exempted from tort liability for damages because of bodily injury, sickness, or disease arising out of the ownership, operation, maintenance, or use of such motor vehicle in this state to the extent that the benefits described in s. 627.736(1) are payable for such injury, or would be payable but for any exclusion authorized by ss. 627.730-627.7405, under any insurance policy or other method of security complying with the requirements of s. 627.733, or by an owner personally liable under s. 627.733 for the payment of such benefits, **unless a person is entitled to maintain an action for pain, suffering, mental anguish, and inconvenience for such injury under the provisions of subsection (2).**

(emphasis added). Subsection 2 of the statute sets the tort threshold, which Plaintiff satisfied by proving a permanent injury. Therefore, the "exemption" referenced in the above passage is inapplicable to the instant case.

In any event, the legislature did not intend this section to provide tortfeasors with any greater setoff than that granted under Fla. Stat. §627.736(3). If Fla.Stat. §627.736(3) is applied as intended, and the jury reduces the plaintiff's damages award by the amount of PIP benefits "paid or payable," the tortfeasor has already received his exemption to the extent PIP benefits were payable. The "exempted . . . to the extent" language in Fla.Stat. §627.737(1) reflects the legislature's intent to allow a plaintiff to recover the amount of her economic damages which exceed her PIP benefits, regardless of whether she suffered a permanent injury. It is not an indication that the legislature intended plaintiffs without a permanent injury to suffer a larger PIP setoff than those who have a permanent injury.

This Court has noted that the purpose of the PIP setoff is the avoidance of a double recovery by the plaintiff. *See Purdy v. Gulf Breeze Enterprises, Inc.*, 403 So.2d 1325, 1329 (Fla. 1981). If so, this purpose would not be served by imposing a larger PIP setoff on those without permanent injuries, and would

produce an unreasonable or ridiculous result, contrary to the rules of statutory construction. *See Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984).

The "exemption" provided for in Fla.Stat. §627.737 is inapplicable to the instant case because Plaintiff was found to have a permanent injury. It is not indicative of a legislative intent to impose a larger PIP setoff than that found in Fla.Stat. §627.736(3), which allows for a reduction in the setoff for Plaintiff's comparative fault.

## VII. ***Langel* and *Assi***

### A. *Langel*

The district court in the instant case chose to follow *Aetna Casualty & Surety Co. v. Langel*, 587 So.2d 1370 (Fla. 4th DCA 1991) instead of *Assi v. Florida Auto Auction of Orlando*, 717 So.2d 588 (Fla. 5th DCA 1998) when determining the amount of the PIP setoff. The *Langel* court, in correctly determining that the PIP setoff should be reduced by the percentage of the plaintiff's comparative negligence, stated as follows:

> 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.

*Langel*, 587 So.2d at 1373. The *Langel* court recognized that the

purpose of the PIP setoff is to prevent a double recovery. Because a tortfeasor already receives a setoff to the extent that a plaintiff is found to be comparatively negligent, granting the tortfeasor a setoff for 100% of the no-fault benefits paid would result in a duplicative setoff.

*Langel* cites *Centennial Ins. Co. v. Fulton*, 532 So.2d 1329 (Fla. 3d DCA 1988), as support for reducing the PIP setoff by the amount of the plaintiff's comparative negligence. In *Fulton*, an uninsured motorist ("UM") carrier sought a 100% setoff for workers compensation benefits received by the plaintiff after the plaintiff was found to be 75% at fault for his injuries. Like PIP benefits, workers compensation benefits are no-fault benefits. *See generally*, Fla.Stat. Ch.440. The *Fulton* court ruled that the UM carrier was entitled to a setoff for only 25% of the workers compensation benefits received by the plaintiff, stating:

> 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.

*Id.* at 1332 (citing *Hartford Accident & Indem. Co. v. Lackore*, 408 So.2d 1040 (Fla. 1982).

In *Lackore*, 408 So.2d at 1042, this Court held that a UM

carrier is only entitled to a setoff for PIP benefits to the extent required to avoid duplication of benefits. A UM carrier stands in the shoes of the uninsured tortfeasor. *See Flores v. Allstate Ins. Co.*, 819 So.2d 740, 751 (Fla. 2002). By reading these cases together, it is clear that this Court has already determined that a tortfeasor is only entitled to a setoff for PIP benefits to the extent required to avoid duplication of benefits. *Langel* (and the First DCA in the instant case) properly followed the precedents established by this Court by holding that a tortfeasor's PIP setoff should be reduced by the percentage of a plaintiff's comparative negligence.

**B. *Assi***

In *Assi v. Florida Auto Auction of Orlando*, 717 So.2d 588 (Fla. 5th DCA 1998), the court reduced the plaintiff's damages award by the percentage of the plaintiff's comparative fault prior to applying a PIP setoff for the full amount of PIP benefits paid to the plaintiff. The *Assi* court ignored the plain language of Fla.Stat. §627.736(3), which requires that the PIP setoff be performed by the jury,[15] an act that takes place prior to the court's reduction for comparative fault. Even if the parties in *Assi* stipulated to the judge applying the PIP setoff,

[15] *Assi* was a jury trial. *See id.* at 589.

as in the instant case, the *Assi* court erred by failing to keep the same order of calculations as would have been performed had the jury applied the setoff, or by reducing the PIP setoff by the percentage of the plaintiff's comparative fault (as was done by the trial court in the instant case).

The *Assi* court cited this Court's opinion in *Wells v. Tallahassee Memorial Regional Medical Center*, 659 So.2d 249, n.3 (Fla. 1995) as support for its order of calculations. However, *Wells* was not an automobile accident case, and therefore the PIP setoff set forth in Fla.Stat. §627.736 was not even an issue. Furthermore, the plaintiff in *Wells* was not found to be comparatively negligent, and none of the setoffs applied were for no-fault benefits. *See Wells*, 659 So.2d at 250-251. *Wells* does not even address, much less support, the order of calculations set forth by *Assi*.

*Assi* also relied on Fla.Stat. §627.737(1) to support its decision to award the defendant a PIP setoff at more than his proportional share. As discussed previously in this brief, the "exemption" found in Fla.Stat. §627.737(1) is inapplicable in the instant case, because Plaintiff suffered a permanent injury. Therefore, to the extent that *Assi's* relies on this provision, its holding does not apply to the instant case. Even if

Plaintiff had not suffered a permanent injury, like the plaintiff in *Assi*, the *Assi* court's determination that the Fla.Stat. §627.737(1) "exemption" provides for a greater PIP setoff than the setoff afforded by Fla.Stat. §627.736(3) is misplaced, as explained previously. *Assi* failed to follow both the plain language of Fla.Stat. §627.736(3), as well as this Court's precedents. The trial court in the instant case, as well as the *Langel* court, applied the PIP setoff as intended, with a reduction for Plaintiff's comparative fault.

## CONCLUSION

The decision of the First District Court of Appeals in the present case should be affirmed. It correctly holds that a tortfeasor receives a set-off only for that percentage of no-fault benefits paid to an injured plaintiff pursuant to Fl.Stat. §627.736 due to injuries caused by the tortfeasor's negligence.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the forgoing has been furnished to Gregory Shoemaker, Esq., Schofield and Wade, P.A., 25 West Cedar Street, Suite 450, Pensacola, Florida 32501 via HAND DELIVERY and Richard A. Sherman, Suite 302, 1777 South Andrews Avenue, Ft. Lauderdale, Florida 33316 via U.S. Mail, postage pre-paid, this ____ day of September, 2003.


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**CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS**

I HEREBY CERTIFY that the font used throughout this brief is Courier New 12-point Font.

Robert T. Bleach, Esq.