SUPREME COURT OF FLORIDA

CASE NO. SC03-127

HELEN M. CARUSO,
individually and on behalf of
CRYSTAL GRUBBS, a minor,
Petitioner,

vs.

EARL BAUMLE,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF FLORIDA
LOWER TRIBUNAL CASE NO. 5D01-2114

ANSWER BRIEF OF RESPONDENT

LOURDES CALVO-PAQUETTE
Florida Bar No. 0817295
LAW OFFICES OF ROBERT SOIFER
390 North Orange Avenue, Suite 1550
Orlando, FL 32801
Phone 407-236-0552
Fax 407-428-1830

and

ELIZABETH C. WHEELER
Florida Bar No. 0374210
ELIZABETH C. WHEELER, P.A.
P.O. Box 2266
Orlando, FL 32802-2266
Phone 407-650-9008
Fax 407-650-9070

Attorneys for Respondent, EARL BAUMLE

TABLE OF CONTENTS

TABLE OF CITATIONS iii

PRELIMINARY STATEMENT vi

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

SUMMARY OF THE ARGUMENT 12

ARGUMENT 16

I. BECAUSE THE DISTRICT COURT DID NOT PASS UPON THE QUESTIONS CERTIFIED TO THIS COURT, THIS COURT LACKS JURISDICTION TO REVIEW THIS CASE. 16

II. UNDER THE CIRCUMSTANCES OF THIS CASE, SECTION 627.736(3) DID NOT REQUIRE EITHER THAT EVIDENCE OF PIP BENEFITS BE PRESENTED TO THE JURY OR THAT THE JURY BE INSTRUCTED THAT THE PLAINTIFF SHALL NOT RECOVER SPECIAL DAMAGES FOR PERSONAL INJURY PROTECTION BENEFITS PAID OR PAYABLE 21

III. BECAUSE PETITIONERS AGREED THAT THE COURT WAS THE TRIER OF FACT WITH RESPECT TO THE PIP SET OFF, SECTION 627.736(3) DID NOT REQUIRE EITHER THAT EVIDENCE OF PIP BENEFITS BE PRESENTED TO THE JURY OR THAT THE JURY BE INSTRUCTED THAT THE PLAINTIFF SHALL NOT RECOVER SPECIAL DAMAGES FOR PERSONAL INJURY PROTECTION BENEFITS PAID OR PAYABLE 22

IV. THE TRIAL COURT DID NOT ABUSE ITS

DISCRETION IN PERMITTING POST-TRIAL DISCOVERY AND ALLOWING INTRODUCTION OF EVIDENCE AS TO THE PIP SETOFF WHERE PETITIONERS AGREED THE PIP SETOFF WAS A MATTER FOR DETERMINATION BY THE COURT POST-TRIAL, AND THE DISCOVERY WAS UNDERTAKEN ONLY BECAUSE PETITIONERS MADE AN UNTIMELY AND UNWARRANTED AUTHENTICITY OBJECTION TO EVIDENCE OF PIP PAYMENTS 41

CONCLUSION 46

CERTIFICATE OF SERVICE 47

CERTIFICATE OF TYPE STYLE AND FONT 47

TABLE OF CITATIONS

Cases

Allstate Insurance Company v. Scott,
773 So. 2d 1290 (Fla. 5th DCA 2001) 15, 33, 34

Barberena v. Gonzalez,
706 So. 2d 60 (Fla. 3d DCA 1998) 36, 37

Bogosian v. State Farm Mutual Automobile Insurance Co.,
817 So. 2d 968 (Fla. 3d DCA),
rev. denied, 833 So. 2d 774 (Fla. 2002) 38, 39

City of Orlando v. Birmingham,
539 So. 2d 1133 (Fla. 1989) 23

Gardner v. Broward County,
631 So. 2d 319 (Fla. 4th DCA 1994) 43

Gold, Vann & White, P.A. v. DeBerry,
639 So. 2d 47 (Fla. 4th DCA 1994) 42

Gormley v. GTE Products Corp.,
587 So. 2d 455 (Fla. 1991) 26, 27, 36

Haycook v. Ostman,
397 So. 2d 743 (Fla. 5th DCA 1981) 29

Jackson v. State,
738 So. 2d 382 (Fla. 4th DCA 1999) 23

John Hancock Mutual Life Ins. Co. v. Zalay,
522 So. 2d 944 (Fla. 2d DCA),
rev. denied, 531 So. 2d 169 (Fla. 1988) 41

Marion v. Cissell,
376 So. 2d 871 (Fla. 5th DCA 1979),
cert. denied, 388 So. 2d 1115 (Fla. 1980) 19, 36

McKenna v. Carlson,
771 So. 2d 555 (Fla. 5th DCA 2000) 32

Nova University, Inc. v. Katz,
636 So. 2d 729 (Fla. 4th DCA 1993),
rev. denied, 639 So. 2d 979 (Fla. 1994) 29

Pirelli Armstrong Tire Corp. v. Jensen,
777 So. 2d 973 (Fla. 2001) 17

Purdy v. Gulf Breeze Enterprises, Inc.,
403 So. 2d 1325 (Fla. 1981) 28

Rollins v. Pizzarelli,
761 So. 2d 294 (Fla. 2000) 27-29

Salcedo v. Asociacion Cubana, Inc.,
368 So. 2d 1337 (Fla. 3d DCA),
cert. denied, 378 So. 2d 342 (Fla. 1979) 43

Constitution and Statutes

Art. V, § 3(b)(4), Fla. Const. 12, 17

§57.105(1), Fla. Stat. (2000) 44

§90.104(1)(a), Fla. Stat. (2000) 23

Florida No-Fault Law, §§627.730-627.7405, Fla. Stat. (1997) 3, 14, 25

§627.736(1), Fla. Stat. (1997) 2

§627.736(3), Fla. Stat. (1997) . . . . . *passim*

§627.737(1), Fla. Stat. (1997) . . . . . *passim*

§768.76(1), Fla. Stat. (2000) 15, 32, 33

Other

Fla. R. Civ. P. 1.370. . . . . 21, 33

Fla. Std. Jury Instr. (Civ.) 6.13 . . . . . 37, 38

PRELIMINARY STATEMENT

The parties will be referenced by proper name or by their position on this appeal. The record from the trial court will be cited by reference to the volume and page number, as (R2.___) The supplemental record from the trial court will be cited as (SR.___) The record from the Fifth District Court of Appeal will be cited as (5D. _____). The Initial Brief in Allstate Insurance Co. v. Scott, 773 So. 2d 1290 (Fla. 5th DCA 2001), which was included in the Appendix to Appellants' Initial Brief, will be cited by the page number in the Scott brief. The Appendix to this Brief will be cited as (App.___)

STATEMENT OF THE CASE

In this action arising out of a motor vehicle accident, Petitioners seek review of a final judgment which reduced the amount of the jury's awards by amounts which had been paid under Petitioners' personal injury protection coverage for Petitioners' past medical expenses. (R2.178-79) The trial court ruled that the sum of $10,000 would be set off against the verdict in favor of Helen Caruso, and the sum of $10,000 would be set off against the verdict in favor of Crystal Grubbs. (R3.512) After the setoffs, Helen Caruso recovered the sum of $8,230.90 and Crystal Grubbs recovered $4,461.23. (R5.787) Petitioner appealed the judgment to the Fifth District Court of Appeal.

The specific question answered by the Fifth District was whether the trial court reversibly erred in allowing Respondent to conduct post-trial discovery and present evidence post-trial regarding the PIP set offs. (5D.14-20) Petitioners did not contest the amount of the set offs and did not contend that the set off should have been determined by the jury and not the court. As reflected in Petitioners' Initial Brief, Petitioners agreed at trial that the PIP set off was a matter for the court to decide post-trial and that evidence of PIP payments was "absolutely not" to be submitted to the jury. (Initial Brief 2-6)

The Fifth District affirmed the judgment. (5D.14-20) Petitioners moved for rehearing, clarification or certification. (5D.24-28) Petitioners requested the Fifth District to certify the following question to this Court:

> Whether section 627.736(3) permits post-trial discovery and proof as to the affirmative defense of PIP benefit setoff, in the absence of a stipulation of the parties?

(5D.28)

In response to the motion for certification, Respondent argued that Petitioners had failed to properly preserve this issue in the trial court. (5D.36) Petitioners consistently and adamantly took the position during trial that the amount of the PIP setoff was a matter for the court to determine post-trial. (5D.32-36) Because the trial court had not been presented in a timely manner with an opportunity to rule on the issue of whether §627.736(3) precluded the trial court from exercising discretion as to how the post-trial proceedings would be conducted, Respondent argued that Petitioners' motion for certification should be denied. (5D.36)

The Fifth District granted Petitioners' motion for certification and certified the following as questions of great public importance:

> IN AN AUTOMOBILE ACCIDENT CASE, DOES SECTION 627.736(3) REQUIRE THAT EVIDENCE OF PIP BENEFITS FOR PURPOSES OF SET OFF BE PRESENTED TO THE TRIER OF FACT, BE IT JUDGE OR JURY, AND IF A JURY, MUST THE JURY BE

> INSTRUCTED THAT THE PLAINTIFF SHALL NOT RECOVER SPECIAL DAMAGES FOR PERSONAL INJURY PROTECTION BENEFITS PAID OR PAYABLE?
>
> OR, PURSUANT TO THAT STATUTE AND ABSENT A WAIVER OR AN AGREEMENT BY THE PARTIES, MAY A PARTY, ASSERTING SET OFF OF PIP BENEFITS, INTRODUCE THAT EVIDENCE AFTER A JURY TRIAL TO THE JUDGE FOR A FACT FINDING OF AMOUNTS INVOLVED, AND FOR PURPOSES OF REDUCING THE PLAINTIFF'S RECOVERY?

(5D.38-39) Petitioners filed a timely notice to invoke this Court's jurisdiction. (5D.41) This Court has postponed its decision as to whether to accept jurisdiction pending review of the briefs on the merits.

STATEMENT OF THE FACTS

This action arose out of a motor vehicle accident which occurred on February 4, 1998. (R1.1) In accordance with the Florida No-Fault Law, §§627.730-627.7405, Florida Statutes (1997), Respondent's answer to Petitioners' complaint asserted that any damages awarded to Petitioners should be reduced by the amount of all benefits paid or payable to Petitioners (including deductible amounts) under the personal injury protection portion of any applicable or required automobile insurance policy. (R1.3a) Respondent propounded discovery on this issue.

In response to Respondent's request for admissions (App.1, ¶5), Petitioners admitted they had received benefits under the personal injury protection portion of an automobile policy for medical bills alleged to have been incurred as a result of the incident described in the complaint. (App.5, ¶5) In response to Respondent's request to produce (App.8), Petitioners on July 2, 1999, produced copies of PIP payment records which had been faxed to Petitioners' counsel by the PIP provider on January 14, 1999 (App.10-16). The payment records showed that a deductible of $2,000 was applicable to each Appellant and that each Appellant had a total of $8,000 in available PIP benefits. (App.14, 167) After the deductible was reached, a cumulative total of $7,389.28 in PIP benefits had been paid on behalf of Helen Caruso as of January 14, 1999. (App.13, 14) After the deductible was reached, a total of $5,630.10 in PIP benefits had been paid on behalf of Crystal Grubbs as of January 14, 1999. (App.13, 15-16)

By order dated December 1, 1999, the case was set for trial during the period beginning March 6, 2000. (R1.6) The order setting the case for trial required the parties to exchange witness lists and evidence schedules at least 45 days before the pretrial conference on February 28, 2000. (R1.6) The order also required the parties to meet at least ten working days prior to the pretrial conference to, among other

things, note all objections on the opponent's exhibit schedule. (R1.7) The order stated:

> Objections not reserved or grounds not noted on such separate schedule will be deemed waived at trial.

(R1.7) The order required the annotated copies of exhibit schedules to be attached to the joint pretrial statement required in paragraph 6(b) of the order. (R1.7-8)

In accordance with the requirements of the order setting the case for trial, Respondent served his witness and exhibit list on January 13, 2000. (R1.16-22) Respondent included on his witness list an insurance records custodian of Underwriters Guarantee, Petitioners' PIP provider. (R1.19) Respondent listed documentation reflecting collateral source benefits paid or payable to Petitioners, including their PIP files; Petitioners' PIP insurance policy; and the PIP logs on his exhibit schedule. (R1.20)

At the parties' pretrial meeting, Petitioners noted an objection to the PIP records custodian on grounds of relevance. (R1.19, 46) Petitioners objected to the PIP exhibits only on grounds of overbreadth and relevance. (R1.47) They did not object on authenticity grounds. (R1.47)

Despite their objections to Respondent's witnesses and exhibits, Petitioners included "all witnesses listed by the Defendant" and "all exhibits listed by the

Defendant" on their own schedule of witnesses and exhibits. (R1.25, 27, 52, 54) The parties attached their annotated witness and exhibit lists to the joint pre-trial statement required by the order setting the case for trial. (R1.41-55) In the joint pre-trial statement the parties stipulated that copies could be used in lieu of originals. (R1.42)

On February 3, 2000, Respondent moved for a continuance of the trial because Petitioners had failed to attend compulsory medical examinations which had been scheduled by Respondent's counsel. (R1.29) Although Petitioners' counsel had filed no prior objection to the CME's, had not moved for protective order, and had not notified Respondent's counsel that his clients would not be attending, he stated after the fact that his clients had not attended the scheduled examinations because he had received 26 days' notice instead of 30 days' notice. (R1.29) Respondent's counsel attempted to coordinate a new date for the CME's but was unable to obtain a date prior to trial that was acceptable to Petitioners' counsel. (R1.29) As additional grounds for the motion for continuance, Respondent cited the fact that Petitioners' counsel had refused to timely provide a signed authorization for Respondent to obtain copies of Petitioners' tax returns from the Internal Revenue Service. (R1.30) On March 2, 2000, the court continued the trial to the July trial docket. (R.56)

The trial commenced on July 19, 2000. (R1.180) At the end of the day on July 20, 2000, the court and counsel conferred as to what would occur the following day.

(SR.794) When Respondent's counsel indicated she would be submitting the PIP payout sheets to indicate what had been paid for the setoffs, the court stated, "You will submit them later" in a post-trial proceeding. (SR.794) The court indicated the PIP payout sheets would not be submitted to the jury, and Petitioners' counsel agreed the payout sheets ***should "absolutely not" be submitted to the jury***. (SR.795)

Petitioners' counsel then objected to the payout sheets on grounds they were not "self-authenticating." (SR.795) It was his position that Respondent was required to introduce authenticated payout sheets at trial but that they should not be part of the evidence presented to the jury. (SR.796-97) The trial court disagreed that the evidence had to be introduced at the trial. (SR.799)

On the next day of trial Respondent requested verification that the PIP setoff would be handled post-trial. (R2.227) Counsel indicated she had PIP payout sheets. (R2.227) Petitioners' counsel again objected to introduction of the PIP payout sheets on grounds of authenticity. (R2.228) Out of an abundance of caution, Respondent's counsel submitted copies of PIP payout sheets to the court. (R2.230) The court indicated that Respondent could file the PIP exhibits for identification. (R2.231) She did so. (R1.143-45, 149-50, 183; R2.231) The filed exhibits showed that benefits had been exhausted as to both Petitioners. (R1.143-45, 149-50; App.17-21)

On July 21, 2000, the jury returned a verdict awarding $16,782.93 to Helen Caruso for past medical expenses and $14,052.59 to Crystal Grubbs for past medical expenses. (R1.141) The jury determined that neither Helen Caruso nor Crystal Grubbs sustained a permanent injury as a result of the accident. (R1.142) Subsequent to trial, Petitioners filed a motion for entry of final judgment in the amounts awarded by the jury with no offset for PIP payments. (R1.185-86) The motion alleged that Respondent's counsel had been "unwilling" to enter into a pre-trial stipulation as to how the offset would be handled. (R1.185) Petitioners asserted they were entitled to judgment with no offset because Respondent had not introduced at trial any admissible evidence of the amount of PIP payments. (R1.186)

At the hearing on Petitioners' motion for entry of final judgment, Respondent's counsel disputed Petitioners' assertion that Respondent was unwilling to enter into pre-trial stipulations with respect to the PIP setoff. (R2.281-82) Furthermore, Respondent's counsel was under the belief that the parties' stipulation to copies in lieu of testimony from records custodians applied to PIP records. (R2.281-82) Respondent's counsel was not aware until the day before the verdict was returned that Petitioners' counsel was contending there was no stipulation with respect to PIP records. (R2.282) Respondent's counsel was not unwilling to stipulate as alleged by Petitioners' attorney. (R2.283)

At the hearing on Petitioners' motion for entry of final judgment, the trial court reiterated its position with respect to the method of handling the PIP offset:

> THE COURT: Let me just say I've done this innumerable times. If you're right [with respect to Petitioners' contention that evidence of PIP payments was required to be submitted at trial], then you're right and then all of us are wrong. What we've been doing is saying the collateral sources will be determined after the jury renders a verdict.
>
> And *we typically wait until the jury's verdict is rendered* because there may not be any collateral, there may not be anything to set-off. There may be that there's no plaintiff's verdict and there's no money to be set-off, but *the practice is to have these collateral sources determined post-trial*.
>
> And I don't know if there's no authority for saying it has to be presented during the trial. The cases you have cited don't hold that. That's not an issue in those cases.
>
> If you're right and the – you're citing a decision that, I guess those McDonald cases goes (sic) back before the statute was amended and back to the time when the issue was presented to the jury, and it's certainly correct that you can't tell the jury to deduct a sum of money for which there is no evidence. And that's what happened in that case.
>
> MR. BYRD: Yes, sir.
>
> THE COURT: And so I don't agree with your position. I didn't agree with it at the trial. I don't agree with it now. I read your cases. They don't hold what you would like for them to hold.

(R2.278-79) (Emphasis supplied.) At the conclusion of the hearing, the court denied Petitioners' motion for entry of final judgment without any reduction of damages for PIP. (R2.289) The court subsequently entered a written order denying Petitioners' motion. (R2.265-66)

On the same day that Petitioners served their motion for entry of final judgment, Respondent served his motion for setoff. (R1.178-79) On September 6, 2000, Respondent noticed a deposition of Petitioners' PIP carrier to be taken on September 12, 2000, in Miami to authenticate the amount of PIP benefits paid. On September 8, 2000, Petitioners moved for a stay as to this post-trial discovery. (R2.297-98) Petitioners asserted in their motion that they intended to file seek review of the trial court's ruling regarding post-trial proceedings. (R2.298)

At the hearing on the motion to stay, Petitioners indicated they would petition for a writ of mandamus "to require the court to enter the judgment in accordance with the verdict, sans or absent the collateral source." (R2.304) The trial court did not agree that mandamus was an appropriate remedy. (R2.304, 305, 306, 307, 308, 309, 310) The court nevertheless granted the motion for stay. (R2.311)

Respondent then moved for a stay of all post-trial proceedings pending disposition of the petition for writ of mandamus. (R2.318) The court agreed that a stay was appropriate in the interest of judicial economy and to avoid piecemeal

disposition of post-trial motions. (R2.329-30) An order granting both motions for stay was entered on October 9, 2000. (R2.329-30)

After Petitioners' petition for writ of mandamus was denied by the Fifth District, Respondent took the deposition of Anthony Baracatt in Miami. (R2.341) Mr. Baracatt was a litigation adjuster with Underwriter's Guarantee Insurance Company. (R2.345) In that position he handles PIP suits. (R2.345) He was the records custodian for the PIP files on Helen Caruso and Crystal Grubbs. (R2.346)

Mr. Baracatt verified that Petitioners were insured by a policy which provided PIP coverage of $10,000 for each person with a $2,000 deductible. (R2.347) He produced copies of the PIP payout logs applicable to Petitioners for the accident at issue in this case. (R2.350) He testified that PIP benefits were exhausted as to Helen Caruso on August 20, 1998. (R2.350) PIP benefits were exhausted as to Crystal Grubbs on April 27, 2000. (R2.351)

On April 25, 2001, a hearing was held on Respondent's motion for setoff. (R2.458-510) At the conclusion of the hearing the court ruled that Respondent was entitled to a $10,000 setoff as to each of the Petitioners. (R2.506) The written order was signed on June 11, 2001. (R2.512)

The final judgment was entered in favor of Petitioners on June 28, 2001. (R5.787) The judgment has been fully paid. (R5.787) Petitioners filed a timely notice of appeal of the judgment to the Fifth District Court of Appeal. (R5.788-90)

Additional reference to the facts will be made in the Argument.

SUMMARY OF THE ARGUMENT

Under article V, section 3(b)(4), of the Florida Constitution, this Court has jurisdiction to review "any decision of a district court of appeal that passes upon a question certified by it to be of great public importance." The Fifth District did not pass upon either of the questions certified to this Court. Therefore, this Court is without jurisdiction to review this case.

As to the first certified question, there was no issue in the trial court as to whether §627.736(3) required evidence of PIP benefits to be submitted to the jury. Petitioners never argued to the trial court that the jury should determine the PIP set off. To the contrary, Petitioners agreed that the court should determine that issue in accordance with the procedure set forth in §768.76. As to the second certified question, Petitioners waived any requirement that evidence of PIP payments be introduced at trial by insisting that the court should determine the PIP set off post-trial.

Furthermore, Petitioners failed to properly preserve for appellate review either of the issues set forth in the certified questions. Both of the certified questions require

construction of §627.736(3). In order to preserve the issues, Petitioners were required to present to the trial court a timely and specific objection based on §627.736(3). Although Petitioners asserted at trial that Respondent was required to introduce evidence of the PIP payments at trial, they did not rely on §627.736(3) as the basis for their objection. Their general objection was not sufficient to preserve the issue for appellate review. The Fifth District was not authorized to address an issue that was not properly preserved, and that issue should not now be addressed by this Court.

If this Court has jurisdiction over this action and if the issues were properly preserved, the final judgment should nevertheless be affirmed. Petitioners contend the trial court reversibly erred in permitting Respondent to do post-trial discovery as to the PIP setoff. However, the standard of review for discovery orders is abuse of discretion. The trial court did not abuse its discretion in permitting Respondent to conduct post-trial discovery in the instant case.

The only reason for the post-trial discovery was the baseless objection by Petitioners' counsel as to authenticity of the PIP payout logs. Petitioners waived that objection by failing to note it on Respondent's exhibit list filed in conjunction with the joint pre-trial statement required by the order setting the case for trial. Petitioners' objection was purely a "gotcha" tactic which has been denounced by Florida courts.

Petitioners' authenticity objection was made solely to gain an unfair and

unwarranted tactical advantage in an attempt to make a double recovery as to the damages which had been paid by PIP. Petitioners contended the amount of PIP benefits had to be proven by authenticated evidence at trial, yet that evidence was "absolutely not" to be submitted to the jury. They cited no authority to the trial court, cited no authority to the Fifth District, and have cited no authority to this Court that requires evidence of PIP payments to be introduced at trial for consideration by the trial court at a post-trial hearing.

The PIP "setoff" is part of the Florida No-Fault Law, §§627.730-627.7405, Florida Statutes (1997). Section 627.736(3) provides that an injured party has no right to recover any damages for which PIP benefits are paid or payable. Section 627.737(1) provides tortfeasors with a corresponding exemption from tort liability for damages for which PIP benefits are payable. There is nothing in the No-Fault Law to suggest that introduction of evidence of PIP payments at trial is a condition precedent to entitlement to the statutory exemption from liability.

Although the No-Fault Law unquestionably altered the common law collateral source rule with respect to damages, it did not clearly abrogate the common law collateral source evidentiary rule. As an alteration of the common law rule, statutory provisions that allow the introduction into evidence and setoff of collateral insurance benefits must be narrowly construed. Because §627.737(1) is silent on the evidentiary

issue, it cannot be said that the statute requires evidence of PIP payments to be introduced at trial.

In Allstate Insurance Company v. Scott, 773 So. 2d 1290 (Fla. 5th DCA 2001), the Fifth District rejected a contention that the defendant was required to introduce evidence of PIP payments during trial. The Fifth District held that §768.76(1) required the trial court to conduct a post-trial collateral source hearing to address the setoff issue. Petitioners contend that Scott should be overruled or clarified, but they provided no good reason for the district court to do so.

Petitioners argue that the district court's ruling in Scott was based on a finding that the plaintiff was estopped from objecting to a post-trial proceeding. However, the same elements of estoppel that were present in Scott are present in the instant case. In Scott as in the instant case the plaintiff's attorney employed "gotcha" tactics in objecting to presentation of evidence at a post-trial hearing.

Petitioners also contend that the trial court's allowance of post-trial discovery sets a "horrendously bad precedent" which will permit defendants to unreasonably delay rendition of judgments. This argument ignores the fact that it was not Respondent but Petitioners who unreasonably delayed entry of the judgment in the instant case. Entry of the judgment was delayed for months in the instant case while Petitioners' meritless petition for writ of mandamus was pending.

In this case the trial judge correctly ruled that evidence of the PIP offset would be introduced post-trial. The trial court permitted post-trial discovery on the issue after Petitioners objected to authenticity of the PIP records even though they had previously waived such objections. Under these circumstances, the trial court did not abuse its discretion in permitting the post-trial discovery and permitting evidence of the PIP set off to be introduced at the post-trial hearing.

If this Court has jurisdiction over this case and the certified questions were preserved for appellate review, the certified questions should be answered in the negative and the final judgment should be affirmed.

ARGUMENT

I. BECAUSE THE DISTRICT COURT DID NOT PASS UPON THE QUESTIONS CERTIFIED TO THIS COURT, THIS COURT LACKS JURISDICTION TO REVIEW THIS CASE.

Under article V, section 3(b)(4), of the Florida Constitution, this Court has jurisdiction to review "any decision of a district court of appeal that passes upon a question certified by it to be of great public importance." The Fifth District did not pass upon either of the questions certified to this Court. Therefore, this Court is without jurisdiction to review this case. *See* Pirelli Armstrong Tire Corp. v. Jensen, 777 So. 2d 973 (Fla. 2001).

As to the first certified question, there was *no issue* in the trial court as to whether §627.736(3) required evidence of PIP benefits to be submitted to *the jury*. To the contrary, Petitioners' counsel agreed that the PIP setoff should be made by *the court* in a post-trial proceeding and argued that evidence of PIP payments should "*absolutely not*" be presented to the jury. (SR1.795) (Emphasis suppliled.) Because no evidence of PIP payments was to be submitted to the jury, there was *no issue* in the trial court as to whether the jury be instructed that Petitioners "shall not recover special damages for personal injury protection benefits paid or payable."

Section §627.736(3) was never raised as a basis for Petitioners' objection at trial. Therefore, the trial court never ruled on that issue. At trial Petitioners' counsel implicitly agreed that the PIP setoff would be determined by the procedure set forth in §768.76. In response to the trial court's statement that "this is one of the collateral sources that we're going to deduct after the trial," Petitioners' counsel stated,

> The statute – you are correct, your honor. *The statute says that's how the Court is to do it.*

(SR.796) Counsel's reference to "the statute" could only mean §768.76, the general collateral source statute, which provides that "*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." (Emphasis supplied.)

Petitioners' counsel repeatedly stated that the set off issue was to be decided by the court and that evidence of PIP payments should not be submitted to the jury:

> THE COURT: I mean, you are not going to submit this to the jury.
>
> MR. BYRD: No, sir, absolutely not. . . .

(SR.795)

> THE COURT: . . . . But you are talking about a determination that is going to be made subsequently.
>
> MR. BYRD: Yes, sir. But the proof must be offered at trial, not subsequent to trial.
>
> THE COURT: During the trial?
>
> MR. BYRD: Yes, sir. The case law is very clear. If you will permit me a moment –
>
> THE COURT: If PIP is going to be offered during the trial, then you are going to be asking the jury to –
>
> MR. BYRD: No, sir. . . .

(SR.796-97)

> MR. BYRD: . . . . The case law says offset is certainly an affirmative defense. While that evidence doesn't go to the jury, it must be filed with the clerk during the trial. . . .

(R2.229) In support of his argument that evidence of PIP payments had to be submitted at trial, Petitioners' counsel referred to a case at "So.2d 673, 871." (R2.233) According to Petitioners' counsel, that case stood for the proposition that "the defense must prove up its affirmative defenses and put evidence of insurance payments in before the conclusion of trial." (R2.233) This was the only authority cited by Petitioners at trial.

Petitioners were apparently referring to the case of Marion v. Cissell, 376 So. 2d 871 (Fla. 5th DCA 1979), as support for their argument that evidence of PIP payments was required to be submitted at trial. This was not the holding in Marion. In Marion the defendants made no effort by pleadings ***or*** proof at trial to show that they were entitled to a credit for PIP benefits. In response to the court's inquiry outside the presence of the jury, the plaintiff stated he had paid premiums for automobile insurance on his own vehicle but had not made any claim under that policy for medical treatment related to the accident. Relying on §627.736, Florida Statutes (1976), the trial court instructed the jury to deduct $5,000 from the plaintiff's damages, and the jury awarded the plaintiff "$2,500.00 over and above the $5,000.00 paid by insurance."

On appeal the district court reversed the judgment. In so ruling the district court noted it is axiomatic that jury instructions must be predicated upon evidence which,

in turn, must be predicated upon the issues in the case. *See id*. at 872. Because the pleadings did not raise any issue regarding PIP benefits and there was no adequate proof of the amount of those benefits paid or payable, the district court held the trial court erred in instructing the jury to reduce the plaintiff's damages.

Marion did not stand for the proposition for which it was cited by Petitioners, which was that "the defense must prove up its affirmative defenses and put evidence of insurance payments in before the conclusion of trial." (R2.233) The issue in Marion was whether the trial court erred in instructing the jury to make the PIP set off when the issue had not been raised in the pleadings and no evidence of PIP payments had been presented at trial. In the instant case the issue of the PIP setoff was unequivocally raised by the pleadings. Furthermore, this was not a case such as Marion where the evidence was at best equivocal as to whether the plaintiff had even received PIP benefits. In the instant case Petitioners' receipt of PIP benefits was conclusively established by Petitioners' affirmative response to Respondent's request for admission of that fact. *See* Fla. R. Civ. P. 1.370(b). The only contention by Petitioners in the instant case was that Respondent failed to introduce evidence at trial to establish the *amount* of the benefits paid.

Petitioner's citation to *Marion* did not raise any issue as to potential conflict between §627.736(3) and §768.76. The Fifth District majority's discussion of this

potential conflict was pure dictum since it was not timely raised as an issue before the trial court. (5D.16) The potential conflict was *never raised by Petitioners at trial*.

As to the second certified question, Judge Harris' concurring opinion below recognized that Petitioners had waived any requirement that evidence of PIP payments be introduced at trial by insisting that the court should determine the PIP setoff post-trial. (5D.21-22) The majority concluded there had been no waiver because Petitioners' counsel "consistently argued that Baumle must submit evidence of PIP setoffs during the trial, although the trial court would later make the calculations and deduct those sums from the final award made by the jury." (5D.15) Based strictly on an analysis of the collateral source statutes, the Fifth District majority concluded that the trial court's ruling that collateral source information did not have to be presented at trial was "probably erroneous." (5D.16)

In reaching this conclusion, the Fifth District engaged in an analysis which was not argued by Petitioners at trial. The record is clear that Petitioners never argued at trial that §627.736(3) required evidence of PIP payments to be submitted at trial. (5D.15-16) The only statute even implicitly referenced at trial by Petitioners' counsel was §768.76. (SR.796)

Neither of the certified questions reflects the issue actually presented to the Fifth District. The issue presented to the Fifth District was whether the trial court erred in

allowing post-trial discovery and introduction of evidence relating to the PIP set off. (5D.14) Because the certified questions did not reflect the issue presented to the Fifth District and the Fifth District did not specifically pass on the issues stated in the certified questions, this Court lacks jurisdiction to decide those issues. This cause should be dismissed.

II. THE QUESTIONS CERTIFIED BY THE FIFTH DISTRICT WERE NOT PRESERVED FOR APPELLATE REVIEW.

Neither any case construing §627.736(3) nor §627.736(3) itself were argued by Petitioners at trial as supporting their contention that evidence of PIP payments had to be submitted at trial although the PIP set off would be determined by the court post-trial. Petitioners' subsequent reliance on §627.736(3) was not sufficient to preserve the issue for appellate review. *See* City of Orlando v. Birmingham, 539 So. 2d 1133, 1135 (Fla. 1989) (quashing a decision of the Fifth District because the court improperly addressed an issue that was not preserved for appellate review by a timely objection at trial). To preserve error for appellate review, an objection must not only be timely but also state the specific ground of objection if the specific ground is not apparent from the context. *See* § 90.104(1)(a), Fla. Stat. (2000). *See also* Birmingham, 539 So. 2d at 1135 (noting that, in the absence of a timely objection, the trial judge does not have the opportunity to rule upon a specific point of law); Jackson

v. State, 738 So. 2d 382, 386 (Fla. 4th DCA 1999) (noting that appellate courts will not consider grounds for objections to the admissibility of evidence unless they have been stated with specificity at trial).

Although Petitioners in the instant case objected at trial, their objection was not based on §627.736(3). They did not contend at trial that §627.736(3) required evidence of PIP payments to be submitted to the jury and agreed that the court should determine the PIP set off. Petitioners' general objection that Respondent was required to prove the PIP set off by introducing evidence at trial was not supported by any specific legal argument.

Both of the questions certified by the Fifth District are based on §627.736(3). Section 627.736(3) was never cited as a basis for Petitioners' objection at trial. Petitioners' subsequent reliance on §627.736(3) was untimely. Therefore, the issues certified by the Fifth District were not preserved for appellate review.

III. BECAUSE PETITIONERS AGREED THAT THE COURT WAS THE TRIER OF FACT WITH RESPECT TO THE PIP SET OFF, SECTION 627.736(3) DID NOT REQUIRE EITHER THAT EVIDENCE OF PIP BENEFITS BE PRESENTED TO THE JURY OR THAT THE JURY BE INSTRUCTED THAT THE PLAINTIFF SHALL NOT RECOVER SPECIAL DAMAGES FOR PERSONAL INJURY PROTECTION BENEFITS PAID OR PAYABLE.

Petitioners unequivocally agreed with the trial court that the PIP set off was a matter for the court to decide post-trial. (SR.795-97) Petitioners did not at any time

argue to the trial court that the PIP set off was a matter for the jury to decide. As Judge Harris noted in his concurring opinion below, Petitioners waived any requirement that evidence of PIP payments be introduced at trial by insisting that the court should determine the PIP set offs post-trial. (5D.21-22) In this case the trial court *was* the trier of fact with respect to the PIP set off.

Petitioners did not raise at trial their argument that §627.736(3) required evidence supporting the PIP set off to be submitted at trial. They now argue that PIP benefits must be proven at trial because otherwise the "trier of fact" could not reduce damages for PIP benefits paid or payable. (Initial Brief 16) Petitioners' argument implies that the jury was the "trier of fact," but they clearly agreed at trial that the court was the "trier of fact" with respect to the PIP issue. As Judge Harris noted in his concurring opinion, because Petitioners had waived any requirement that evidence of PIP payments be introduced at trial by insisting that the court should determine the PIP setoff post-trial, Petitioners were not prejudiced by the court's receiving the evidence of collateral source payments post-trial when it was determining the amount of the setoff. (5D.21-22)

The PIP set off is required by multiple provisions of the Florida No-Fault Law, §§627.730-627.7405, Florida Statutes (1997). Section 627.736(3) provides in pertinent part:

> . . . . 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. . . .

Section 627.737(1) provides that a defendant in an action arising out of a motor vehicle accident is exempt from liability for damages to the extent those damages are payable by the injured person's PIP benefits:

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

(Emphasis supplied.) Although §627.736(3) contains additional language providing that "the court shall instruct the jury that the plaintiff shall not recover such special damages for personal injury protection benefits paid or payable," there is no similar provision in §627.737(1).

Construing §627.736(3) and §627.737(1) together, there is no clear legislative mandate that evidence of PIP benefits must be submitted at trial. Nothing in §627.737(1) requires evidence of PIP payments to be introduced at trial in order for the statutory exemption to apply. Nothing in §627.737(1) suggests or even implies that it was intended to abrogate the common law collateral source rule which prohibits introduction of evidence of third party payments at trial.

The Florida No-Fault Law unquestionably altered the common law collateral source rule with respect to actions arising out of motor vehicle accidents. However, there are two aspects to the collateral source rule. The No-Fault Law clearly altered only one aspect of the rule.

The collateral source rule functions both as a rule of damages and as a rule of evidence. *See* Gormley v. GTE Products Corp., 587 So. 2d 455, 457 (Fla. 1991). As a rule of damages, the common law rule "permits an injured party to recover full compensatory damages from a tortfeasor irrespective of the payment of any element of those damages by a source independent of the tortfeasor." *See id.* As a rule of evidence, "the collateral source rule prohibits the introduction of any evidence of payments from collateral sources." *See id*. In Gormley the district court Court noted that, although the legislature has required that some collateral sources shall reduce

damages (referring to §§627.7372[1], 768.50 and 768.76), the ***legislature has not required the admission of any collateral source into evidence at the liability trial.*** *See* 587 So. 2d at 459.

Although Gormley was not a motor vehicle case involving issues as to a PIP setoff, its principles were cited by this Court in Rollins v. Pizzarelli, 761 So. 2d 294, 300 (Fla. 2000). In Rollins this Court noted that, as an alteration of the common law collateral source rule, the statutory provisions that allow the introduction into evidence and setoff of collateral insurance benefits must be narrowly construed. *See* 761 So. 2d at 300. The Rollins decision did not in any way suggest or imply that either §627.736(3) or §627.737(1) altered the common law evidence rule to the extent that the statutes *require* evidence of PIP benefits to be admitted at trial.

---

[1]Section 627.7372, Florida Statutes (1978), was a part of the No-Fault Law and provided as follows in subsection (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 which have been paid to the claimant prior to the commencement of the trial 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.

Construed narrowly pursuant to Rollins, §627.736(3) and §627.737(1) clearly altered the common law collateral source rule as to damages. Section 627.736(3) provides that an injured party "shall have *no right to recover* any damages for which personal injury protection benefits are paid or payable." The primary purpose of §627.736(3) is to prevent injured persons from receiving double recovery. *See* Purdy v. Gulf Breeze Enterprises, Inc., 403 So. 2d 1325, 1328 (Fla. 1981). This legislative intent is reflected in §627.737(1), which provides a corresponding exemption from tort liability for damages caused by owners and operators of motor vehicles *"to the extent that the benefits described in s. 627.736(1) are payable for such injury."*

The legislature did not so clearly abrogate the common law rule which prohibits introduction of evidence of collateral sources. Because §627.737(1) is silent as to this issue, the most that can be said is that the No-Fault Law abrogated the common law rule of evidence to the extent that it permits but does not mandate introduction of evidence of a plaintiff's PIP benefits. Petitioners' contention that the legislature intended to require a defendant to introduce evidence of the plaintiff's PIP benefits at trial or lose the statutory exemption from liability for damages for which PIP benefits are paid or payable is inconsistent with the primary purpose of §627.736(3), which is to prevent a double recovery to the plaintiff.

Although Rollins was decided before the trial in the instant case, Petitioners did not argue at trial that either Rollins or §627.736(3) required evidence of PIP payments to be submitted to the jury. Petitioners argued only that evidence of PIP payments had to be submitted at trial because the PIP set off was an affirmative defense. Petitioners relied on §768.76 as providing the procedure by which the PIP set off was to be calculated, but nothing in §768.76 requires evidence of collateral sources to be admitted into evidence at trial.

Petitioners now also rely on the case of Haycook v. Ostman, 397 So. 2d 743 (Fla. 5th DCA 1981), but that case did not involve any collateral source issue. Haycook involved a suit on a promissory note and a failure by the defendant to introduce any evidence on the affirmative defense of fraud. Haycook is thus distinguishable bvoth substantively and procedurally from the instant case.

Although Nova University, Inc. v. Katz, 636 So. 2d 729 (Fla. 4th DCA 1993), also relied upon by Petitioners, involved a collateral source issue, the issue was not raised until after the final judgment was entered in that case. The collateral source issue in Katz was abandoned by the filing of a notice of appeal before the trial court ruled on the motion. Those procedural circumstances were not present in the instant case.

Petitioners have cited no authority which actually stands for the proposition that Respondent was *required* to introduce evidence at trial concerning Petitioners' PIP benefits despite the aspect of the common law collateral source rule which precludes admissibility of such evidence.

Petitioners' current position that evidence of PIP benefits should have been "put before the jury" (Initial Br. at 14) is diametrically opposed to their position at trial that such evidence should "absolutely not" be submitted to the jury. (SR.795) Petitioners did not argue to the trial court that evidence of PIP payments should have been considered by the jury and in fact strenuously objected to the jury's consideration of such evidence. (SR.795-97) Petitioners agreed that the setoff issue should have been determined by the trial court post-trial. (SR.795.97) Under these circumstances, there was no good reason to require evidence of PIP payments to be submitted at trial, prior to any determination of Petitioners' damages. The timing of the proof of the amount of PIP benefits was properly within the trial court's discretion, and the procedure used by the trial court was the most judicially expedient. As noted in Judge Harris' concurring opinion, if the court was to determine the appropriate setoff, it should have the discretion to receive the proper evidence at the time it determined the issue. (5D.22)

Petitioners' current argument that §627.736(3) is more specific than §768.76, the general collateral source statute (Initial Brief 17-18), was not made at the trial. Petitioners quoted the following language from the Fifth District's opinion below:

> Logically, if the defendant neglects to present evidence of the plaintiff's PIP benefits, the jury cannot be faulted for failing to consider those payments in its award.

(Initial Brief 18, quoting 835 So. 2d at 280) ***There was no issue in this case as to whether the jury erred in failing to consider PIP benefits in its award because both the trial court and the parties agreed that the jury would not determine the PIP set off.***

Petitioners also make the new argument that §627.736(3) is more specific than §627.737(1) to the issues in this case. Petitioners failed to preserve this issue for appeal. If the issue were properly preserved, the argument is nevertheless unavailing. Section 627.737 is the portion of the No-Fault Act that specifically addresses actions for recovery of damages from a third party such as Respondent, and it is silent as to how and when the PIP set off is to be determined.

Petitioners rely on McKenna v. Carlson, 771 So. 2d 555 (Fla. 5th DCA 2000), for the broad proposition that §768.76(1)[2], the general collateral source statute, does

[2]Section 768.76(1) provides that the court shall reduce the amount of any damages awarded by the amount of collateral source benefits which have been paid

not apply to PIP benefits. This argument was not made at trial, where, as discussed above, Petitioners agreed that §768.76(1) set forth the procedure for determining the PIP set off. Furthermore, Petitioners misconstrued the holding in McKenna. The issue in McKenna was whether the trial court erred in applying §768.76(1) to reduce the PIP setoff by the amount of the premium paid by the plaintiff for PIP and collision coverage. *See* 771 So. 2d at 558. The Fifth District held that §627.736 was the applicable statute as to that issue, and §627.736 does not provide for a reduction from the set off for automobile insurance premiums. *See* 771 So. 2d at 558.

Barely three months after the Fifth District decided McKenna, it decided the case of Allstate Insurance Company v. Scott, 773 So. 2d 1290 (Fla. 5th DCA 2001). Judge Cobb authored both opinions. Scott involved an issue almost identical to that in the instant case.

In Scott the Fifth District held the trial court reversibly erred in denying a setoff for the plaintiff's PIP benefits. *See id*. at 1291. Noting that Allstate raised as an affirmative defense its entitlement to a setoff for PIP benefits paid to Scott, the district court held that §768.76(1) required the trial court to conduct a post-trial collateral source hearing to address the setoff issue. *See id*. Citing both §768.76(1) and §627.736(3), the Fifth District rejected Scott's contention that Allstate was required

---

on behalf of a claimant.

to introduce evidence of PIP benefit payments during the course of the jury trial. *See* 773 So. 2d at 1291. The majority in the instant case adhered to the Scott decision. (5D.20)

Petitioners argue that Allstate's brief in Scott shows that the case is factually distinguishable from the instant case. (Initial Br. at 20) They argue that the Fifth District's ruling in Scott was based on a finding that the plaintiff was estopped from objecting to a post-trial proceeding because he had agreed to a post-judgment determination of collateral sources and had further agreed that the matter could be handled by affidavit. (Initial Br. at 20) Petitioners argue that the elements of estoppel were not present in the instant case. (Initial Br. at 20)

To the contrary, Petitioners' conduct in the instant case was no less egregious than the conduct in Scott. In the instant case Petitioners conclusively admitted before trial that they had received PIP benefits. *See* Fla. R. Civ. P. 1.370(b). Petitioners produced copies, albeit outdated, of the PIP payout sheets and waived any authenticity objection to the payout sheets by failing to lodge it prior to trial. Respondent had no reason to anticipate that Petitioners would object to authenticity of PIP records after they had waived that objection by failing to note it as required by the order setting the case for trial. This is precisely the type of "gotcha" tactics to which Allstate objected in Scott. *See* Scott Brief at 36, 38-39.

There is an additional similarity between the instant case and Scott. Allstate argued in Scott that it should not be penalized for relying on the trial court's ruling during the trial that the PIP setoff issue would be handled by affidavit submitted post-trial. *See* Scott Brief at 37-40. In the instant case Respondent's counsel similarly relied on the trial court's ruling during the trial that the PIP setoff would be handled post-trial, including the introduction of evidence on the issue.

The record shows that on July 20, 2000, Respondent intended to offer evidence of PIP payments on July 21, 2000. (SR1.794) However, the trial court made it clear on July 20, 2000, that the setoff issue would not be considered at the trial. (SR1.799) Petitioners' counsel agreed the issue would be handled post-trial and that the jury would not receive or consider any evidence of PIP payments. (SR.795-97) Out of an abundance of caution, Respondent's counsel filed copies of the PIP payout sheets for identification purposes. (R1.143-45, 149-50, 183; R2.230-31) The PIP payout sheets filed at trial showed that PIP benefits had been exhausted as to both Petitioners (App.17-21), and this was precisely the information obtained from the deposition of Anthony Baracatt (R2.350-51).

Mr. Baracatt's testimony served only to confirm the amount of PIP benefits paid. Petitioners' affirmative response to Respondent's request for admission had already conclusively established the fact that PIP benefits had been paid so as to entitle

Respondent to the statutory exemption provided by §627.737(1). Section 627.737(1) exempted Respondent from any liability for damages to Petitioners to the extent that those damages had already been paid by PIP. Petitioners' untimely authenticity objection did not entitle them to a double recovery for those damages.

Petitioners argue that, because Respondent listed the PIP log as an exhibit and the PIP records custodian as a witness, he must have anticipated evidentiary objections at trial. (Initial Br. at 16) This argument ignores the fact that Respondent's witness list and exhibit schedule were prepared well over a month *before* the parties' pretrial meeting required by the order setting the case for trial. *After* that meeting, where Petitioners' counsel objected to PIP evidence only on grounds of relevancy, Respondent had no reason to believe that any other objection would be raised at trial. In light of Petitioners' relevancy objection, Respondent had even less reason to believe that Petitioners would insist that PIP evidence be submitted at trial in order to preserve Respondent's statutory immunity from liability for damages for which PIP benefits had been paid.

In their footnote 8 Petitioners cited two cases as support for their argument that evidence of PIP payments had to be submitted at trial. Neither is applicable to the instant case. One of those cases was Marion v. Cissell, which was discussed above. The other was Barberena v. Gonzalez, 706 So. 2d 60 (Fla. 3d DCA 1998).

While it is true that the court in Barberena held that the trial court erred in granting the defendants' post-trial motion for a PIP setoff, that case is distinguishable from the instant case. In Barberena the defendants' post-trial motion for setoff was made pursuant to §768.76. Because the accident occurred prior to the effective date of the repeal of §627.7372, the Third District held that §627.7372 and not §768.76 applied to the setoff. The court interpreted §627.7372(1) as requiring the presentation of evidence of collateral source payments to the jury. Because the defendants failed to present such evidence at trial, the court concluded the post-trial motion for setoff pursuant to §768.76 should have been denied.

For multiple reasons, the holding in Barberena does not apply to the instant case. The Third District's conclusion in Barberena was inconsistent with this Court's observation in Gormley that §627.7372 did not require the admission of any collateral source into evidence at the liability trial. *See* 587 So. 2d at 459. Furthermore, the accident herein occurred after the effective date of the repeal of §627.7372. Section 627.7372 was repealed as of October 1, 1993 and applied to causes of action accruing on or after that date. Ch. 93-245, §§3-4, at 2439 Laws of Fla. The accident in the instant case occurred on February 4, 1998.

After §627.7372 was repealed, this Court revised Standard Jury Instruction (Civil) 6.13. *See* Standard Jury Instructions – Civil Cases 6.13 – Collateral Source

Rule, 700 So. 2d 377 (Fla. 1997). This Court revised the notes on use of the instruction to state that "in all actions accruing on or after October 1, 1993, reduction for collateral source payments should be made by the court, not the jury, pursuant to §768.76, F.S. (1986 Supp.), and 6.13a." *See* 700 So. 2d at 379. Although this Court expressed no opinion on the correctness of these revisions and reminded all interested parties that its approval foreclosed neither requesting additional or alternative instructions nor contesting the legal correctness of the instructions, Petitioners did not at trial object to the procedure set forth in §768.76 and, if fact, agreed that it applied to the PIP set off.

Standard Instruction 6.13a reflects the practice ordinarily followed in Florida's trial courts, including the trial court below. (R2.278) Because Standard Instruction 6.13a is currently the only standard instruction relating to collateral sources, the Fifth District's reference to Bogosian v. State Farm Mutual Automobile Insurance Co., 817 So. 2d 968 (Fla. 3d DCA), *rev. denied*, 833 So. 2d 774 (Fla. 2002), does not support Petitioners' argument that evidence of PIP payments should have been submitted at trial. Bogosian was an uninsured motorist case, and a copy of State Farm's policy was actually introduced in evidence at the trial. The face sheet of the policy showed that it included no-fault benefits, and the text of the policy showed that no-fault benefits were available. Because the policy provided a basis upon which the jury

could have inferred the payment of collateral source benefits, the Third District concluded that a collateral source jury instruction should have been given in accordance with Note 1 to Florida Standard Jury Instruction 6.13. Note 1 states that, if the payment of collateral benefits is inferred, Instruction 6.13a should be given. Instruction 6.13a tells the jury not to reduce its award by the amount of collateral source benefits and that the court will make any necessary reductions. Thus, Bogosian is consistent with the agreed procedure in this case that the court and not the jury should have made the PIP setoff.

Petitioners' arguments that "merely pleading an affirmative defense has never been enough with respect to any other affirmative defenses," that "these defenses must be proven at trial," and that "there is no logical reason to treat PIP setoffs any differently" are simply wrong. (Initial Br. 23) Petitioners *agreed* at trial that §768.76 provided the procedure for determining the PIP set off, and §768.76 clearly requires a post-trial proceeding to determine collateral source set offs. Nothing in §768.76 requires evidence of collateral sources to be submitted at trial.

Petitioners' suggestion that Respondent refused to stipulate as to certain collateral source offset matters is contradicted by the record. The record shows that Respondent was *not* unwilling to stipulate and that his counsel was completely surprised by Petitioners' contention that she would not enter into such a stipulation.

(R2.283) According to Respondent's counsel, Petitioners' attorney rushed her through the attorneys' meeting immediately prior to trial and the issue of such a stipulation was never addressed at that meeting. (R2.282)

Petitioners' prediction of potential horribles that might occur as a result of post-trial resolution of collateral source issues is neither realistic nor supported by this record. As the trial judge noted at the hearing on August 15, 2000, collateral source issues are routinely handled post-trial. (R2.278) Post-trial resolution of collateral source issues is consistent with the policy decision of the Florida legislature as set forth in §768.76. There is no policy reason to handle the PIP set off differently from other collateral sources.

Any delay in resolution of the PIP setoff in the instant case was not the fault of Respondent but the result of Petitioners' unreasonable and unwarranted objection to admissibility of the PIP payment logs, Petitioners' motion for stay to prevent Respondent from going forward with a scheduled deposition of the PIP carrier, and their subsequent filing of an inappropriate petition for writ of mandamus.

Petitioners' contention that Respondent waived or abandoned his entitlement to a PIP offset by failing to introduce admissible evidence at trial is belied by the record. Before Petitioners made any objection as to the authenticity of the PIP payment logs proffered by Respondent, the trial court indicated that evidence of the

setoff would be submitted post-trial in accordance with the usual and customary practice. (SR1.794) After Petitioners made their objection, Petitioners' attorney and the court engaged in the following colloquy:

> MR. BYRD: And Your Honor can't do the calculations unless that evidence is put in for Your Honor's consideration.
>
> THE COURT: It's not going to be done tomorrow, that's what I am talking about.
>
> MR. BYRD: But see, Your Honor, that is my point. It must be done tomorrow, not at some subsequent trial date. The defense must prove up their affirmative defenses at trial.
>
> . . . .
>
> And so I am going to hold the defense to their burden of putting on whatever evidence they need to prove up the affirmative defenses. That is an affirmative defense of theirs. I do not –
>
> THE COURT: Well, I don't really understand that. I don't understand that we're going to have an evidentiary hearing after the jury goes out in which they are going to prove up their collateral sources. But typically it's something that's entered afterward. . . .

(SR.799-800) The court did not change this ruling prior to the conclusion of trial, and Respondent relied on it in presenting the rest of his case. Even if the ruling were wrong, Respondent had the right to rely on it and should not now be penalized by his

good faith reliance. *See* John Hancock Mutual Life Ins. Co. v. Zalay, 522 So. 2d 944, 946 (Fla. 2d DCA 1988).

In this case the trial judge correctly ruled at trial that the PIP offset would be handled post-trial. This ruling was in accordance with all relevant considerations, not the least of which was Petitioners' agreement that the amount of the PIP offset was a matter for the court to determine post-trial. The ruling complied with the legislative intent that Petitioners not be awarded a double recovery, and it also satisfied the common law evidentiary rule which precludes admissibility of collateral source evidence at trial.

If this Court has jurisdiction over this case and the issue was properly preserved, the first certified question should be answered in the negative.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING POST-TRIAL DISCOVERY AND ALLOWING INTRODUCTION OF EVIDENCE AS TO THE PIP SETOFF WHERE PETITIONERS AGREED THE PIP SETOFF WAS A MATTER FOR DETERMINATION BY THE COURT POST-TRIAL, AND THE DISCOVERY WAS UNDERTAKEN ONLY BECAUSE PETITIONERS MADE AN UNTIMELY AND UNWARRANTED AUTHENTICITY OBJECTION TO EVIDENCE OF PIP PAYMENTS.

Petitioners contend the trial court committed "reversible error" in permitting Respondent to do post-trial discovery as to the PIP setoff. (Initial Br. at 14) However, the standard of review for discovery orders is abuse of discretion. *See*,

e.g., Gold, Vann & White, P.A. v. DeBerry, 639 So. 2d 47, 56 (Fla. 4th DCA 1994). The trial court did not abuse its discretion in permitting Respondent to conduct post-trial discovery and introduce such evidence as to the PIP set off in the instant case.

Once Petitioners agreed that the jury should absolutely not receive evidence of PIP payments and that the PIP set off was a matter for determination by the court post-trial, the issue of post trial discovery was within the trial court's discretion. The only reason for the post-trial discovery was the unwarranted and untimely objection by Petitioners' counsel as to authenticity of the PIP payout logs. The objection was unwarranted because Petitioners knew they had exhausted their PIP benefits. The objection was untimely because the order setting the case for trial provided that all objections to exhibits must be made on the parties' pre-trial schedules of exhibits and that any objections not made would be waived. (R1.7) Petitioners noted no authenticity objection to PIP payout logs listed on Respondent's pre-trial schedule of exhibits and thereby waived the objection.

After waiving any objection as to authenticity of the PIP payout logs, Petitioners contended at trial that Respondent could only prove the PIP set off through authenticated documents. Petitioners knew their PIP carrier was located in Miami, yet they failed to place Respondent on notice before trial of any necessity to present testimony of any representative of the PIP carrier to authenticate records. Because

Petitioners agreed that the PIP set off should be made by the court post-trial, it was only fair that Respondent be permitted to conduct post-trial discovery to authenticate records to meet Petitioners' untimely objection.

Petitioners' belated objection to authenticity of the payout logs was a classic example of the "gotcha" tactics which have been denounced by Florida courts. *See.*, *e.g.*, Gardner v. Broward County, 631 So. 2d 319 (Fla. 4th DCA 1994) (noting Justice Thornal's statement in Cabot v. Clearwater Construction Co., 89 So. 2d 662, 664 (Fla. 1956), that the trial of a lawsuit should be a sincere effort to arrive at the truth and is no longer a game of chess in which the technique of the maneuver captures the prize); Salcedo v. Asociacion Cubana, Inc., 368 So. 2d 1337, 1339 (Fla. 3d DCA 1979). The logs were authentic, Petitioners' counsel knew they were authentic, Petitioners' counsel in fact had originally produced logs to Respondent, and Petitioners' counsel had waived any objection to the logs on grounds of authenticity by failing to note it in accordance with the requirements of the order setting the case for trial. Petitioners' authenticity objection was made solely to gain an unfair and unwarranted tactical advantage in an attempt to make a double recovery on the damages which had been paid by PIP.

Petitioners' argument that permitting post-trial discovery sets a "horrendously bad precedent" is similarly baseless. Petitioners contend that allowing such discovery

permits defendants to delay rendition of final judgments and otherwise stall resolution of cases "long after the plaintiff has prevailed in a jury trial." (Initial Br. at 14) Petitioners' argument ignores the circumstances in this case. *In this case* it was the *plaintiffs* who made a surprise objection at trial and then delayed rendition of the final judgment for months by filing a petition for writ of mandamus which the Fifth District found to be so lacking in merit as to warrant an award of attorney's fees to Respondent pursuant to §57.105(1), Florida Statutes (2000). (App.22-24)

Because Petitioners agreed that the PIP set off was a matter for determination by the court post-trial, there was no reason to require evidence of PIP payments to be introduced at trial. It was within the court's discretion to permit post-trial discovery as to the amount of the setoff in light of Petitioners' untimely and unwarranted authenticity objection.

If this Court has jurisdiction over this case and the issue was preserved for appellate review, the second certified question should be answered in the negative.

CONCLUSION

If this Court has jurisdiction over this case and the certified questions were preserved for appellate review, the certified questions should be answered in the negative and the final judgment should be affirmed.

Respectfully submitted,

_____

LOURDES CALVO-PAQUETTE
Florida Bar No. 0817295
LAW OFFICES OF ROBERT SOIFER
NationsBank Center, Suite 1550
390 North Orange Avenue
Orlando, FL 32801
Phone 407-236-0552
Fax 407-428-1830

ELIZABETH C. WHEELER
Florida Bar No. 0374210
ELIZABETH C. WHEELER, P.A.
P.O. Box 2266
Orlando, FL 32802-2266
Phone 407-650-9008
Fax 407-650-9070

Attorneys for Respondent
EARL BAUMLE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies hereof have been mailed this 27th day of May, 2003, to Donald Paul McCaskill, Esquire, P.O. Box 540024, Orlando, FL 32854-0024, and Jeffrey Byrd, Esquire, 801 North Magnolia Avenue, Suite 405, Orlando, FL 32803, Attorneys for Petitioners, and to Tracy Raffles Gunn, Esquire, P.O. Box 1438, Tampa, FL 33601 and Thomas R. Thompson, Esquire, P.O. Box 15158, Tallahassee, FL 32317, counsel for amicus curiae, Florida Defense Lawyers Association.

LOURDES CALVO-PAQUETTE
Florida Bar No. 0817295
LAW OFFICES OF ROBERT SOIFER
Bank of America Center, Suite 1550
390 North Orange Avenue
Orlando, FL 32801
Phone 407-236-0552
Fax 407-428-1830

and

ELIZABETH C. WHEELER
Florida Bar No. 0374210
ELIZABETH C. WHEELER, P.A.
P.O. Box 2266
Orlando, FL 32802-2266
Phone 407-650-9008
Fax 407-650-9070

Attorneys for Respondent, EARL BAUMLE

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this brief was typed in 14 point Times New Roman.

ELIZABETH C. WHEELER
Florida Bar No. 374210