SUPREME COURT OF FLORIDA

No. SC03-127

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

Petitioners,

vs.

EARL BAUMLE,

Respondent.

SECOND AMENDED INITIAL BRIEF OF PETITIONERS

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF FLORIDA

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PRELIMINARY STATEMENT

The Petitioners will be referred to as "Petitioner." Respondent will be referred to as "Respondent." The following citation references will be used: "R." for the record; "T." for the transcript; and "A." for the appendix.

STATEMENT OF THE CASE AND OF THE FACTS

This appeal stems from a jury trial that began on July 19, 2000, and resulted in a verdict in favor of the Petitioners, HELEN M. CARUSO and CRYSTAL GRUBBS, in the amount of $18,335.93 and $14,052.59, respectively. (R. 152.) The trial concerned a February 4, 1998, car accident in which the Petitioners[1] were injured. (R. 1.) Petitioner filed suit in May of 1999 against EARL BAUMLE ["Respondent"] seeking damages. Id. One of the affirmative defenses Respondent asserted was collateral source setoff. (R. 34.) Respondent ultimately admitted liability before trial.

Trial was originally set to start on March 6, 2000. (R. 56.) In compliance with a Pre-trial Order, Petitioner and Respondent filed Witness and Exhibit lists. Therein, Respondent identified the records custodian of Petitioner's auto insurance carrier, Underwriters Guarantee, as a potential witness, and listed her PIP insurance records as potential exhibits. (R. 46-48.) In accordance with the trial court's Uniform Order Setting Case for Jury Trial dated December 1, 1999 (R. 6), the parties held a pre-trial meeting where they exchanged exhibits, identified witnesses, announced objections to each other's Witness and Exhibit lists, and discussed possible stipulations. The Uniform

[1] Underwriters Guarantee is Helen M. Caruso's automobile insurance carrier.

Order directed that discovery was to end on February 27, 2000. (R. 8.)

Per Respondent's request, (R. 29), the original trial date was continued for several months. In a subsequent Amended Uniform Order, a new discovery cut-off date provided that: "[a]ll discovery shall close on the day prior to the pretrial conference unless extended by Court order for good cause shown." (R. 38.) A Second Order Amending Uniform Order Setting Case for Jury Trial and Pretrial Conference required that the pretrial conference was to occur on June 26, 2000. (R. 36.) Discovery was thus to have concluded on or before June 25, 2000.

Trial started on July 19, 2000. (R. 180.) During trial, Respondent failed to authenticate any of Petitioner's insurance records in connection with his defense of PIP benefits setoff. Respondent also failed to call any insurance representative, failed to place Petitioner's insurance policy with Underwriter's Guarantee into evidence, and failed to cross-examine Petitioner about her entitlement to PIP benefits. At trial, the following discussion regarding PIP benefits setoff occurred between counsel and the trial judge outside of the presence of the jury:

> MS. CALVO-PAQUETTE: Do it tomorrow. Right. And then also I will be submitting the PIP payout sheets to indicate what's been paid for the setoffs.
>
> THE COURT: You will submit them later.

MS. CALVO-PAQUETTE: Well, to the Court, yes.

THE COURT: Yeah. When we get around to –

MR. BYRD: I may have some objections since I have not seen what she intends to submit.

MS. CALVO-PAQUETTE: Well –

THE COURT: I think it's going to be a post-trial proceeding.

MR. BYRD: No. You mean as far as the Court's calculations?

THE COURT: Yeah.

MR. BYRD: Well –

THE COURT: I mean, you are not going to submit this to the jury.

MR. BYRD: No, sir, absolutely not. All I am saying is that I am going to –I have offered Ms. Paquette three months ago a stipulation which was declined, so I am going to hold her to her duty of proving up her affirmative defenses. I don't think that a PIP–

THE COURT: What affirmative defense?

MR. BYRD: The affirmative defense of collateral source offset. I don't think a PIP payout sheet is necessarily –

THE COURT: So you are going to ask her to prove it during the trial?

MR. BYRD: Well, the document itself is not self-authenticating.

THE COURT: No, it's not.

MR. BYRD: And since I am not seeing what you are talking about –

MS. CALVO-PAQUETTE: We are talking about these.

THE COURT: I thought what we were talking about was the collateral – this is one of the collateral sources that we're going to deduct after the trial.

MR. BYRD: No. The statute – you are correct, your honor. The statute says that's how the Court is to do it. All I am saying is the defense has the burden to prove their affirmative defenses. I didn't know you want me to waive that requirement.

THE COURT: I'm not asking you to waive anything. I am just saying this is something – this is not something that's going to be part of the –

MS. CALVO-PAQUETTE: But we had agreed also that we would not require representatives, that we could submit –

MR. BYRD: So this is the most current (PIP payout sheet).

MS. CALVO-PAQUETTE: No. I am trying to get the most current one.

MR. BYRD: See, this is exactly my point, Your honor. She doesn't know what she is going to present because she doesn't have the current document. So I am entitled to an accurate document.

THE COURT: I agree. 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. Perhaps I am not being clear.

THE COURT: Yes.

MR. BYRD: The evidence needs to be put in the record during the trial. When you are saying post trial, I am not intending on doing post-trial discovery.

(R. 794–97.)

Just before the defense rested its case, and over the objection of the Petitioners' attorney, Respondent filed a one-year-old copy of the alleged PIP payout sheets, (R. 229), with the trial court clerk:

MS. CALVO-PAQUETTE: Judge, with respect to what came up yesterday before we left concerning setoff, is the – I don't know if Mr. – Byrd has not shown me any authority that would require that the information concerning the setoff be introduced at trial. And the Court had indicated that it would be done post-trial. I just want to make it clear, because I do have PIP payout sheets from Helen Caruso that would show the benefits have been exhausted.

THE COURT: Yeah, okay.

MR. BYRD: Your honor–well, I will let you finish.

MS. CALVO-PAQUETTE: I have PIP payout sheets with respect to Crystal Grubbs; last entry was July 1, 1999. He has had other medical – I have been attempting all week to get the additional information. And the file was – and they have not provided that to me. Additionally, and it would show a cumulative amount at this point of $6,119 and respect to what premiums Mrs. Caruso has paid, that typically is not provided to us by the PIP carrier. So it would require me to obtain the records again.

And of course, they – they're getting it out of storage as we speak. I have been expecting a fax. They have indicated they would provide that information to me. And then I got a message this morning indicating that the file was, in fact, closed.

I know that the law was changed in 1993. Previously it did require that to be entered at the time of trial, when the jury was making the calculations, but not the Court.

MR. BYRD: Your honor, I strenuously object to what counsel is proposing to do for the reasons made known yesterday. This case was set for trial in March. Counsel has had plenty of time to obtain this information.

Your honor, she has PIP payout sheets. She does not have an adjustor here to authenticate the information she wants to place into evidence right now. She has subpoenaed the documents from the insurance company. Your honor, the law requires that the defendant prove up its affirmative defense. 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. And then it is up to the Court to do the subsequent calculations later, which is very easy because the numbers speak for themselves.

THE COURT: If you want to file whatever you want to file, go ahead and file it, but I don't – I don't have a witness here to – so you don't have a witness here to deal with that. But we –

MR. BYRD: Essentially, Your Honor, I want to state for the record that the defense by failure to comply with their duty in proving up the affirmative defense –

THE COURT: Okay. You have made this argument yesterday.

MS. CALVO-PAQUETTE: Judge, in addition –

THE COURT: She can file whatever she wants to file. Let's just get on

with it.

(R. 227–29.) (Emphasis added.)

* * * * * *

THE COURT: Now, are we ready to go into closing arguments?
Are we ready to go into closing arguments?

MS. CALVO-PAQUETTE: Judge, in an abundance of caution I will submit this at this time and –

THE COURT: Okay. File it.

MS. CALVO-PAQUETTE: – update that information.

THE CLERK: Are they going to be an exhibit or –

THE COURT: Just make them exhibits for identification.

THE CLERK: Okay.

THE COURT: They don't go to the jury.

THE CLERK: Sure.

MR. BYRD: Just for the record, I am going to object because I haven't been shown that document and I think that's an inaccurate document.

THE COURT: Well, whatever it is –

MS. CALVO-PAQUETTE: He was shown that document yesterday and today.

MR. BYRD: No, no. It's inaccurate. That does not show my client's credit.

(R. 230–31.)

Thereafter, the defense rested and closing arguments were given to the jury.

After the jury was sent to deliberate, Respondent filed a purportedly "updated" PIP payout sheet which had apparently just been faxed to her office. (R. 143; 231.) It is undisputed that Respondent called no witnesses to authenticate either of above-referenced payout sheets at trial, nor did he otherwise make any attempt to properly admit these documents into evidence. Before trial, Respondent did not file a motion to extend the discovery deadlines which the Uniform Order Setting Case for Jury Trial had set.

Following trial, Respondent did not file a motion for new trial, rehearing or for judgment notwithstanding the verdict.

After trial, Respondent filed a Motion for Set-off seeking a reduction for collateral sources allegedly paid and PIP deductibles selected. (R. 178.) Petitioner filed a Motion for Entry of Final Judgment in Accordance with the Verdict. (R. 185.) The lower court held a hearing on Petitioner's Motion on August 15, 2000. At this hearing, the court stated:

> THE COURT: I do remember that. I don't think there's any question about the fact that the Defendant has to prove the PIP payout and just filing the payout sheet is, over objection, is not going to cut that, but they should be able to supply testimony or affidavits or whatever to substantiate the amount of the PIP payments and if there's any dispute about it, you can certainly engage in discovery and determine how much the PIP payments are.

MR. BYRD: Your honor, I would respectfully disagree and –

THE COURT: You disagree that you can't conduct discovery and find out what they are?

MR. BYRD: Yes, sir. I disagree that it can be done post-trial, your honor.

(Emphasis added.) (R. 274.)

The trial court acknowledged at the August 15th hearing that the Petitioner's attorney had properly and timely raised his objections as to the admissibility of the PIP payout sheets at trial and that the PIP payout records were not automatically admissible. (R. 279-281; 286-287.) After hearing arguments from both parties' attorneys, the trial court denied the Plaintiffs' Motion for Entry of Final Judgment in Accordance with the Verdict. (R. 289.)

On August 29, 2000, the trial court entered an Order on Plaintiffs' Motion for Entry of Final Judgment in Accordance with the Verdict. (R. 265.) Therein, the Court denied the Plaintiffs' Motion stating that it "disagrees with the Plaintiffs' argument that the Defendant cannot prove such [setoff] defenses post-trial." Id.

On September 29, 2000, the Petitioner filed a Petition for Writ of Mandamus with the lower tribunal in which she sought reversal of the trial court's decision to permit post-trial discovery regarding the question of setoff. In an opinion dated February 2, 2001, the lower tribunal denied the Petition stating, "[t]he issue of a post-

trial collateral set-off can be raised on direct appeal." Caruso v. Baumle, 776 So.2d 371 (Fla. 5th DCA 2001) (citing Allstate Insurance Co. v. Scott, 773 So.2d 1290)). Respondent sought and were granted attorneys' fees. (R. 733.) The trial court later held a hearing on this matter and awarded Respondent attorney's fees. (R. 787.)

On April 25, 2001, the trial court held a hearing as to Respondent's Motion for Set Off, which had been filed on July 31, 2000. (R. 458; 178-79.) By Order dated June 11, 2001, the lower court: (1) granted Respondent's Motion for Set Off; (2) found that the sum of $10,000 should be set off against the verdict in favor of Petitioner Caruso; and (3) found that the sum of $10,000 should be set off against the verdict of Petitioner Grubbs. (R. 512.) On June 28, 2001, the trial court entered a Final Judgment. (R. 787.) Therein, the court ruled: (1) that Petitioner Caruso shall recover from Respondent the sum of $8,230.90; (2) that Petitioner Grubbs shall recover from Respondent the sum of $4,461.23; and (3) that the Petitioners' net award should be $18,499.19. (R. 787.)

On July 6, 2001, Petitioners filed their Notice of Appeal with the lower tribunal. (R. 788.)

In an opinion written by Judge Sharp, the court reluctantly affirmed the ruling of the trial court. Caruso v. Baumle, 835 So.2d 276 (Fla. 5th DCA 2002). The lower tribunal initially set forth the trial court's ruling as it appeared in the appellate transcript:

> The Court: The question is: Do you have to present the collateral source information during trial or not? And the answer is not. You present it afterwards. Now present it. Put it in affidavit form and present it. I've ruled on it and let's go on.

Id. at 278.

The lower tribunal then stated in its written opinion: "[b]ased strictly on an analysis of the collateral source statutes, this ruling is probably erroneous." Id.

The lower tribunal then began its substantive discussion as to whether the affirmative defense of PIP setoff may be proven post-trial. Although it ultimately concluded that it was bound by its previous ruling in Allstate Ins. Co. v. Scott, 773 So.2d 1290 (Fla. 5th DCA 2001), the lower tribunal noted the analytical weaknesses of that decision:

> But the court did not address the differences between the two statutes or reconcile the obvious assumption in section 627.736(3) that the "trier of fact" will hear evidence of the PIP setoffs, be it judge or jury, and that the jury will be instructed plaintiffs cannot recover such PIP benefits paid or payable. In a recent case, our sister court has ruled that in motor vehicle accident cases, a collateral source instruction regarding PIP payments and benefits should be given to the jury. Bogosian v. State Farm Mutual Auto. Ins. Co. 817 So.2d 968, 27 Fla. L. Weekly D1240, 2002 WL 1058503 (Fla. 3d DCA May 29, 2002).
>
> We are bound by the Allstate case. However, we write to point out there is an ambiguity in the statutes which needs to be addressed by the Legislature.

Caruso, 835 So. 2d at 280.

On January 3, 2003, the lower tribunal certified as questions of great public

importance the following:

> 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?

Id at 281.

On January 17, 2003, Petitioners filed a Notice to Invoke Discretionary Jurisdiction. (R. 41.) This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court's decision to permit post-trial discovery as to the defense of PIP benefits setoff was reversible error. Defendants must prove up this affirmative defense at trial. As shown by section 627.736(3), Florida Statutes, and relevant case law, the defense of PIP setoff is no exception to this established principle. Accordingly, this Court should answer the first certified question in the affirmative.

Respondent knew he had to prove his PIP setoff defense at trial. His pretrial witness list and list of possible issues to be tried all support this point. His advocacy below regarding the alleged permissibility of conducting post-trial discovery should be seen for what it is: a rationalization for failing to meet his burden of proof at trial.

Petitioner's contention that PIP benefits setoff cannot be subject to post-trial discovery or proof steers clear of the inevitable delays which plaintiffs would have to endure should this Court rule otherwise. Thus, from the perspective of both law and policy, the trial court's ruling warrants reversal.

ARGUMENT

The Trial Court Committed Reversible Error in Permitting Respondent to Conduct Post-trial Discovery as to Its Affirmative Defense of PIP Benefits Setoff

The trial court's ruling regarding post-trial discovery as to the defense of PIP benefits setoff was reversible error. The court's ruling also sets a bad precedent which will permit defendants to delay the rendition of final judgments and otherwise stall the resolution of cases long after the plaintiff has prevailed in a jury trial.

It is basic that defendants have the burden of proof with regard to affirmative defenses that would serve to avoid liability or reduce damages. Haycock v. Ostman, 397 So.2d 743 (Fla. 5th DCA 1981). Such affirmative defenses must be proven up at trial. In the case of a collateral source offset defense, the same principle applies. See Nova University, Inc. v. Katz, 636 So.2d 729 (Fla. 4th DCA 1993)(noting, in denying motion for rehearing, that a defendant's motion to amend judgment by deducting collateral source payments was abandoned where defendant raised necessity to reduce any damages awarded by collateral sources as affirmative defense in answer but did not raise issue again either before or during trial).[2]

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[2] "While . . .[the affirmative defense of collateral source reduction] was raised as an affirmative defense, the party raising the issue has the burden of preserving and proving it." 636 So.2d at 731. Petitioners recognize that there are procedural distinctions between this case and Katz, but submit that the decision's

Section 627.736(3), Florida Statutes (2001), applies to the setoff of PIP benefits. Rollins v. Pizzarelli, 761 So.2d 294 (Fla. 2000). This case involves the affirmative defense of PIP benefits setoff. In Rollins, this Court specifically found that section 627.736(3) governed the question of whether the term "payable" referred to incurred expenses that had not be paid at the time of trial, rather than potential future expenses that have not yet been incurred.

Section 627.736(3), Florida Statutes (2001)[3], provides:

> 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 into 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.)

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basic premise that collateral source setoff is an affirmative defense which must beproven at trial is equally applicable here, where it is clear that Respondent made no serious effort at trial to meet its burden.

[3] This Court has recognized that section 627.736(3) applies to motor vehicle accidents. See Sheffield v. Superior Insurance Co., 800 So.2d 197 (Fla. 2001). "However, because this was a motor vehicle accident, the jury would not award damages for personal injury protection ("PIP") benefits that were paid or payable. See section 627.736(3), Fla. Stat. (2000); see generally Rollins, 761 So.2d at 294." Sheffield, 800 So.2d at 200.

No provision for post-trial discovery or post-trial proof of PIP setoff appears in section 627.736(3). Indeed, this statute assumes that PIP benefits must be proven up at trial. Were this not so, the trier of fact could not reduce damages for PIP benefits "paid or payable"--a potentially critical determination, as shown by this Court's opinion in Rollins v. Pizzarelli. The lower tribunal noted that the Third District Court of Appeal recently held that in motor vehicle accident cases, a collateral source instruction regarding PIP payments and benefits should be given to the jury. Caruso, 835 So. 2d at 280 (citing Bogosian v. State Farm Mutual Auto. Ins. Co., 817 So.2d 968 (Fla. 3d DCA 2002)). Citing this Court's opinion in Sheffield, supra, the lower tribunal observed:

> The common law rule on collateral sources has been altered by statute. See Sheffield v. Superior Insurance Co., 800 So.2d 197 (Fla. 2001); Allstate Insurance Co. v. Rudnick, 761 So.2d 289 (Fla. 2000). Unfortunately, these statutes have been inconsistent in their treatment of collateral sources.
>
> * * * * * *
>
> These two statutes clearly conflict in their treatment of collateral sources. Section 768.76 requires the court to reduce the damage award by the collateral source payments. Section 627.7372 requires that evidence of collateral sources be presented to the jury during trial and the jury deduct those payments from the verdict. (Emphasis added.)

Caruso, 835 So.2d at 278-79.

A key misconception underlying the trial court's ruling is the notion that PIP

benefits cannot be put before the jury under any circumstances. This idea, however, contravenes the express wording of the statute. The legislature's intent must be determined primarily from the language of the statute. See Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank, 609 So.2d 1315, 1317 (Fla.1992). Accordingly, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Modder v. American Nat'l Life Ins. Co., 688 So.2d 330, 333 (Fla.1997) (quoting Holly v. Auld, 450 So.2d 217, 219 (Fla.1984)).

Given the language of section 627.736(3), which expressly provides for admission into evidence and instruction of the jury as to collateral sources, and the principle that a defendant has the burden of proof with regard to affirmative defenses that would serve to avoid liability or reduce damages, it is clear that the trial court's decision to overlook Respondent's failure to offer admissible evidence on the question of PIP setoff at trial

and to permit post-trial discovery on this point was reversible error. Indeed, the lower tribunal recognized that since section 672.7372 was specifically directed at tort actions involving motor vehicles, Florida courts have held that in automobile accident cases, "this section controlled over the general collateral source statute." Caruso, 835 So.

2d at 279 (citing Barberena v. Gonzalez, 706 So.2d 60 (Fla. 3d DCA 1998); Kirkland v. Allstate Insurance Co., 655 So.2d 106 (Fla. 1st DCA 1995); White v. Westlund, 624 So.2d 1148 (Fla. 4th DCA 1993)); see also Allstate v. Rudnick, 761 So.2d 289 (Fla. 2000). The lower tribunal stated in the opinion below that the instant case "involves another more specific collateral source statute, section 627.736(3)." Caruso, 835 So.2d at 279. It then compared an earlier statute, section 627.7372, Florida Statutes (Supp. 1992), to section 627.736(3), and concluded:

> Sections 627.736 and 627.7372 are both contained in Part XI (Motor Vehicle and Casualty Insurance Contracts) or Chapter 627. Section 627.7372(1) required the jury to deduct collateral source benefits from its verdict. Likewise, section 627.736 requires the trier of fact not to award damages for PIP benefits.
>
> In cases involving section 627.7372(1), the courts reversed setoffs where the defendants failed to present evidence of collateral source payments to the jury. Barberena; Kirkland. This principle should also apply to cases involving section 627.736(3). 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.

Caruso, 835 So. 2d at 280.

A basic principle of statutory construction is that a specific statutory provision governs a general one. See McKendry v. State, 641 So.2d 45, 46 (Fla.1994) ("a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms"). The language of section 627.736(3) directs that the trier of fact may not award PIP benefits paid or payable,

and mandates that the trial court shall instruct the jury that the plaintiff may not recover such damages. This language is plainly more specific to the issues in this appeal than the more general provisions of section 627.737(1).[4] Section 627.736(3) should therefore control the issues in this case.

Accordingly, this Court should overrule the lower tribunal's opinion in Allstate Ins. Co. v. Scott, 773 So.2d 1291 (Fla. 5th DCA 2001). In Scott, Allstate Insurance Company appealed from a trial court's refusal to permit a setoff for PIP benefits. Allstate had posed the affirmative defense of setoff based on PIP benefits the PIP carrier had paid the plaintiff. The Fifth District Court of Appeal found that "[t]he trial court should have conducted a post-trial collateral source hearing to address the issue of a PIP setoff from the damage award contained in the verdict." Id. at 1290 (citing to both sections 627.736(3) and 768.76(1)). Yet this ruling simply cannot be reconciled with the lower tribunal's statement in another one of its decisions, McKenna v. Carlson, 771 So.2d 555 (Fla. 5th DCA 2000), that "[s]ubsection 768.76(1) does not govern PIP setoffs but rather controls other collateral source payments received by an injured party." Id. at 558. (Emphasis added.)

If section 627.736(3) plainly envisions proof of PIP benefits and submission of

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[4] Before the lower tribunal, Respondent maintained that nothing in section 627.737(1) requires evidence of PIP payments to be introduced at trial.

evidence to the jury at trial, then the Fifth District Court of Appeals' pronouncement in McKenna is absolutely correct. Moreover, the above-referenced language from Scott which allowed the trial court to conduct a post-trial collateral source hearing is in direct conflict with McKenna's teaching that section 627.736(3)--not section 768.76--applies to the setoff of PIP benefits.

The facts of the Scott decision are also materially different from those of the instant case. In Scott, Allstate appealed from a trial court's ruling which had barred it from obtaining a setoff for PIP benefits. On appeal, the lower tribunal reversed and determined that the trial court should have conducted a post-trial collateral source hearing to address the issue of PIP setoff from the damage award contained in the jury's verdict. Although it is not clear from the factual exposition which appears in Scott, the briefs filed in that case show that the plaintiff's attorney had agreed to a post-judgment determination of collateral sources and had further agreed that this matter could be handled by affidavit. A certified copy of Allstate's brief as to this point is attached hereto.[5] ("A.) One of the arguments Allstate made in Scott was that the plaintiff was estopped from objecting to a post-trial proceeding because he had previously agreed to one. Such is hardly the case here, however, as counsel for

[5] See Fla. R. Evid. 90.202(6), which permits a court to take judicial notice of the records of any court of this state.

Petitioners repeatedly objected to a post-trial proceeding. (R.279-81; 286-87)

The ultimate weakness of the Scott decision, however, is its insubstantial analytical basis. That weakness was enough to cause the Fifth District Court of Appeal to criticize its own ruling in Scott:

> Citing to both sections 627.736(3) and 768.76(1) in Allstate v. Scott, 773 So.2d 1290 (Fla. 5th DCA 2001), this court stated that a party asserting the defense of PIP benefit setoffs was not required to introduce that evidence during the course of the jury trial. But the court did not address the differences between the statutes or reconcile the obvious assumption in section 627.736(3) that the "trier of fact" will hear evidence of the PIP setoffs, be it judge or jury, and that a jury will be instructed plaintiffs cannot recover such PIP benefits paid or payable. In a recent case, our sister court has ruled that in motor vehicle accident cases, a collateral source instruction regarding PIP payments and benefits should be given to the jury. Bogosian v. State Farm Mutual Auto. Ins. Co., 817 So.2d 968, 27 Fla. L. Weekly D1240, 2002 WL 1058503 (Fla. 3dDCA May 29, 2002).

Caruso, 835 So. 2d at 280-81.

In this case, Respondent made no serious attempt at trial to meet his burden of proving up the affirmative defense of PIP setoff. He certainly cannot blame the Petitioner for this. Counsel in personal injury cases commonly stipulate to the amount of collateral sources to avoid having to call a records custodian at trial. See Rollins, 761 So.2d 294, 296 (Fla. 2000)("[t]he trial judge ruled that because the PIP payments were made part of the record of the case through the payout ledger, the future PIP benefits issue could be taken up post-trial"); State Farm Mut. Auto. Ins.

Co. v. Vega, 753 So.2d 738, 740 (Fla. 3d DCA 2000)(during trial, parties agreed to resolve all set-off issues post-trial with the court). If no stipulation is reached--as was the case in these proceedings--

attorneys should fully expect that they will have to meet their burden at trial as to collateral sources just as they would with any other defense. Once the amount of PIP benefits "paid or payable"[6] has either been stipulated to or proven at trial, the trial court merely performs a simple mathematical calculation after trial. That is entirely different, however, from what happened in this case where additional depositions had to be taken after the conclusion of trial. (R. 341.)

The trial court ruled incorrectly in finding that the defense of PIP benefits setoff did not have to be proven at trial. Were this conclusion correct, an entire range of post-trial discovery regarding collateral sources would be permissible without any reasonable limitation as to how long a defendant could string out a plaintiff before a final judgment is entered. It is easy to imagine post-trial petitions for writ of certiorari as to discovery disputes which could delay rendition of final judgments for months. Nor would completion of post-trial discovery necessarily signal conclusion of a case because the defendant could still take an appeal after entry of the final judgment. The Florida Rules of Civil Procedure contain no guidelines as to the time frames within

[6] See Rollins, supra.

which such post-trial discovery would have to be completed, and thus the potential for delay as to plaintiffs is considerable.

Respondent's view of the law would permit a defendant to plead the affirmative defense of PIP benefits setoff, then fail to conduct discovery as to it or prove it at trial. A second post-trial proceeding, complete with new discovery and the potential for certiorari and appellate review, would then have to occur as a prelude to entry of a final judgment. Merely pleading an affirmative defense has never been enough with respect to any other affirmative defenses. These defenses must be proven at trial. There is no logical reason to treat PIP setoffs any differently.

"A judgment or decree is a judicial act of the court. It terminates the proceedings, merging the cause of action on which it is founded." 35 Fla. Jur.2d Judgments and Decrees, section 107 (1996)(citations omitted). "Every lawsuit seeks to end a controversy, and to end it justly." Id. at section 108. The trial court's ruling below as to post-trial discovery frustrates the goal of finality because it potentially delays the entry of a final judgment almost indefinitely. Petitioners submit that defendants already have enough tools by which they can keep a case moving along at a glacial pace. They are hardly in need of any new ones.

Respondent could easily have stipulated as to collateral sources, but he declined to so. Before trial, Respondent could have taken the deposition of the appropriate

adjuster and read it to the jury at trial.[7] After refusing to stipulate, Respondent's only overture towards meeting his burden at trial was try to admit into evidence outdated PIP

payout sheets which even the trial court later acknowledged were improper and inadmissible. (R. 279) Respondent listed Petitioners' PIP insurance policy and PIP log as Exhibits in its Pretrial Exhibit List and set forth the insurance records custodian for Underwriters Guarantee (Petitioner Caruso's insurer), as well as for Allstate in item number eight (8) of its witness list. (R. 47; 46) Respondent therefore anticipated evidentiary objections at trial. Yet he never called the witnesses he listed to testify at trial regarding the authenticity of the documents he sought to admit into evidence. He does not deserve a reprieve to conduct discovery post trial on PIP benefits in light of his failure to pursue this affirmative defense either before or during trial.

Florida law is clear: A defendant has the burden of proving an affirmative defense which was raised in an answer. There is no "automatic" entitlement to an offset without sufficient, adequate proof at trial.[8] Respondent made a strategic

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[7] The adjuster lives in Miami and thus was outside the 100-mile range contemplated by Florida Rule of Civil Procedure 1.330(a)(3). (R. 341) His deposition was eventually taken after trial. (R.341-43)

[8] A decision involving a pre-1993 accident is Barberena v. Gonzalez, 706 So.2d 60 (Fla. 3d DCA 1998)(defendants who failed to present evidence of collateral source payments to jury were not entitled to set-off). See also Marion v.

decision not to accept the Petitioner's offer to stipulate as to the handling of PIP benefits. This strategy left him with the evidentiary obligation to prove by competent, admissible evidence his defense of PIP benefits setoff before he rested his case. In failing to meet his burden of proof at trial, Respondent has waived or abandoned this defense. Respondent's improper attempt to offer into evidence an PIP payout sheet containing handwritten entries—a document which was plainly not self-authenticating,[9] was not stipulated to in terms of admissibility, and was never authenticated during trial, all show that Respondent did not meet its burden of proof at trial and that accordingly, no offset should have been permitted.

Respondent may contend that because Petitioner made no authenticity objections in connection with pretrial and witness and exhibit lists, he was not on notice of possible authenticity objections at trial. This argument ignores the fact that Respondent himself obviously anticipated authenticity objections as shown by his inclusion of the insurance records custodian for Underwriters Guarantee (Petitioner

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Cissell, 376 So.2d 871 (Fla. 5th DCA 1979)(trial court, without plaintiff's insurance policy or limits of its coverage in evidence or proof of amount of personal injury protection benefits paid or payable, erred by instructing jury to deduct $5,000.00 from plaintiff's damages).

[9] The PIP sheets were inadmissible hearsay. Section 90.803(6), Florida Statutes, provides an exception to this problem where a proper predicate is laid at trial with a records custodian or other qualified witness.

Caruso's insurer) in item number eight (8) of his witness list. (R. 46.) The presence of the insurance custodian on Respondent 's witness list can only be accounted for as a tool to establish authenticity and thus avoid the inherent hearsay problems that the PIP sheets plainly presented. Respondent also listed the following as "**Issues of Fact to be Tried**" in his Pretrial Statement dated June 15, 2000:

> 5. Were Plaintiffs, HELEN CARUSO and CRYSTAL GRUBBS, damages paid by a collateral source for which Defendant(s) are entitled to a setoff?
>
> 6. Will Plaintiff(s) damages be paid or payable by a PIP insurer for which Defendants are entitled to a setoff? (R. 81)

Thus, Respondent knew he had to prove up his PIP setoff defense at trial and apparently had every intention of doing so. The real problem here is that Respondent never attempted to properly prove up this defense. Accordingly, the trial court should not have allowed a setoff against the jury's verdict in favor of Petitioners.

CONCLUSION

This Court should quash the Fifth District Court of Appeals' decision and answer the first certified question in the affirmative. The trial court's ruling permitting post-trial discovery as to the affirmative defense of PIP benefits setoff should be reversed, and this Court should remand with instructions to enter a judgment in accordance with the verdict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent by U.S. Mail this _____ day of April, 2003, to Elizabeth C. Wheeler, Esquire, P.O. Box 2266, Orlando, FL 32802-2266, and Tracy Raffles Gunn, Esquire, P.O. Box 1438, Tampa, Fl 33601.

Respectfully submitted by,

_____

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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