IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1327

SANDRA MALU,

Petitioner,

v.

SECURITY NATIONAL INSURANCE COMPANY,

Respondent.

ON APPEAL FROM
THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

I. FACTS RELATING TO THE FOURTH DISTRICT'S DECISION

Plaintiff/Petitioner Sandra Malu has invoked this Court's jurisdiction to review a decision rendered by the Fourth District Court of Appeal wherein the Fourth District certified conflict with a decision rendered by the Fifth District Court of Appeal on the same legal question. An examination of the Fourth District's decision in this case and the Fifth District's decision in *Hunter v. Allstate Insurance Company*, 498 So. 2d 514 (Fla. 5th DCA 1986) shows that a conflict exists as to whether Florida's PIP statute allows insureds to recover personal transportation costs incidental to medical treatment, specifically mileage reimbursement. The Fourth District concluded that the PIP statute cannot be interpreted to allow for the recovery of transportation costs. The Fifth District — interpreting the same statutory provision — held otherwise in *Hunter*. Based on its interpretation of the PIP statute, the Fourth District affirmed the trial court's order dismissing Plaintiff Malu's complaint against Defendant/Respondent Security National Insurance Company with prejudice and acknowledged conflict with the *Hunter* decision. Because express and direct conflict exists, this Court has jurisdiction to review the Fourth District's decision in this case and to resolve the conflict in the law. The record facts from the trial court proceeding which are relevant to the issue on review are set forth next.

II. FACTS RELATING TO THE TRIAL COURT PROCEEDINGS

A. Plaintiff Malu sues Security National based on the company's mileage reimbursement rate

Sandra Malu brought a two count complaint against Security National Insurance Company in Broward County Circuit Court. (R. Vol. I, pp. 1-9).[1] Malu sued Security National for breach of its PIP insurance contract and for declaratory relief. (R. Vol. I, pp. 1-9). In her complaint, Malu alleged that Security National had reimbursed her 34.5 cents per mile for travel expenses she incurred in connection with medical treatment she received following an automobile accident. (R. Vol. I, pp. 1-9). The pertinent portion of Malu's complaint which sets out these facts reads as follows:

> 4. Malu was insured under a private passenger automobile insurance policy from Security National.
>
> 5. On or about March 17, 2001, Malu was involved in a motor vehicle accident. In the motor vehicle accident, Malu suffered personal injuries, which required medical attention.
>
> 6. Malu made a claim for personal injury protection ["PIP"] medical benefits under Security National's policy. Malu's claim number is 01801968.
>
> 7. Particularly, Malu used a private passenger automobile to attend medical treatment received as a result of the motor vehicle accident, and incurred the associated transportation costs.

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[1]The record on appeal will be referred to as (R. Vol.). All emphasis is added unless noted otherwise.

> 8. Security National paid Malu for the transportation costs at the rate of 34.5 cents per mile.
>
> 9. Malu does not dispute Security National's payment of automobile transportation benefits at a fixed mileage rate. Malu does dispute the amount at which Security National set that rate, i.e., 34.5 cents per mile.

(R. Vol. I, pp. 1-9).

According to Malu, Security National's reimbursement rate of 34.5 cents per mile was unreasonably low. (R. Vol. I, pp. 1-9). As one of her remedies, Malu requested a declaratory ruling from the trial court on this issue. (R. Vol. I, pp. 1-9). In her complaint, Malu specifically referenced a decision from the Fifth District Court of Appeal which held that the PIP statute contemplated the reimbursement of reasonable travel costs. (R. Vol. 1-9). Malu alleged that she was uncertain as to whether Security National's mileage rate was reasonable in light of the PIP statute, the Fifth District's decision and information purportedly published by the United States Department of Transportation which sets a higher mileage rate based on cost of operation:

> 30. This is an action for a declaratory judgment, according to Chapter 86 of the Florida Statutes, with respect to the construction of an insurance policy and the meaning of a statute: Florida Statutes §627.736(1)(a).
>
> 31. Plaintiffs are unsure as to Plaintiff's rights under Defendant's policy of insurance and Florida law, §627.736(1)(a), which provides in pertinent part (bold emphasis added):
>
> > (1) Required benefits. — Every insurance policy complying with the security requirements of s. 627.733 shall provide personal injury protection to the named insured, relatives

> residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle, and other person struck by such motor vehicle and suffering bodily injury while not an occupant of a self-propelled vehicle, subject to the provisions of subsection (2) and paragraph (4)(d), to a limit of $10,000 for loss sustained by any such person as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle as follows:
>
> (a) Medical benefits — Eighty percent of all **reasonable** expenses for necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and necessary ambulance, hospital and nursing services. Such benefits shall also include necessary remedial treatment and services recognized and permitted under the laws of the state for an injured person who relies upon spiritual means through prayer alone for healing, in accordance with his or her religious beliefs.

32. Particularly, Plaintiffs are in doubt as to: whether Florida Statutes §627.736(1)(a), as interpreted in Hunter v. Allstate Insurance Co. 498 So.2d 514 (Fla. 5th DCA 1986)(cost of transportation incurred in connection with reasonable and necessary medical treatment was reasonable expense for necessary medical services, and thus reimbursable medical benefit under this section), permits Security National to pay its insureds' automobile mileage usage rate at the amount it has selected, 34.5 cents per mile.

33. In other words, plaintiffs are in doubt as to whether 34.5 cents per mile is a statutorily "reasonable" amount, given that 34.5 is significantly below the cost of operating an automobile indicated by U.S. Department of Transportation and the U.S. Department of Commerce data (see attached exhibit graph)? (sic).

(R. Vol. I, pp. 1-9).

Lastly, Malu alleged that the facts the trial court needed in order to issue a declaratory ruling in this case were pled in the complaint *or* were ascertainable and that her right of recovery was dependent upon the application of Florida law:

> 34. The facts necessary for this Honorable Court to render Plaintiffs' declaration of rights are set forth in this complaint or are ascertainable by this Honorable Court.
>
> 35. Plaintiffs' right to recovery under Defendant's policy of insurance is dependent on this Honorable Court's finding of facts and/or application of Florida Law.
>
> * * *
>
> 44. Security National set and paid the medical treatment transportation mileage cost rate at only 34.5 cents per mile.
>
> 45. Thus, Security National breached the insurance contract, because it should have paid Plaintiffs not 34.5 cents per mile but a higher rate, not less than 50 cents per mile, as indicated in attached exhibits A and B.

(R.Vol. I, pp. 1-9).

B. Security National moves to dismiss Malu's complaint on several grounds, including failure to state a cause of action

Security National filed a motion to dismiss Sandra Malu's complaint. (R. Vol. I, pp. 24-31). The motion raised five grounds for dismissal, to wit: 1) failure to state a claim; 2) the improper nature of declaratory relief; 3) the reimbursement rate was reasonable as a matter of law; 4) no basis for a class action; and 5) the doctrine of primary jurisdiction governs such that the reimbursement rate should be decided by the Department of Insurance. (R. Vol. I, pp. 24-31). Security National filed a memorandum

of law in support of its motion addressing each of these issues. (R. Vol. I, pp. 90-102). Malu did not file a memorandum of law in opposition, despite being given the opportunity to do so by the trial court. (R. Vol. I, pp. 103-104). Following a hearing on the motion, the trial court entered the order of dismissal at issue here. (R. Vol. I, pp. 105-107). The substance of the trial court's order is discussed next.

C. The trial court grants Security National's motion to dismiss on multiple grounds

The trial court's order speaks for itself. Accordingly, Security National sets out the substance of the order verbatim:

> Plaintiff has filed a Class Representation Complaint in which she alleges that as a result of an automobile accident, she sustained injuries that required medical attention. The Plaintiff used a private passenger automobile to attend her medical appointments and, as a result, incurred transportation costs. The Plaintiff submitted a claim for personal injury protection ("PIP") benefits to her insurer, Security National, who reimbursed her transportation costs at a rate of 34.5 cents per mile. In the Complaint, Plaintiff alleges that Security National violated Florida's PIP statute, §627.736(1)(a) Florida Statutes, and breached its contract by reimbursing her at that rate. The Plaintiff also seeks Declaratory Relief, requesting this Court to determine that §627.736 Florida Statutes does not

permit Security National to pay for automobile usage mileage at its set rate of 34.5 cents per mile. Plaintiff claims that Security National should have paid her at a higher rate that is not less than 50 cents per mile. Security National has now moved to dismiss Plaintiff's Class Representation Complaint.

Pursuant to §627.736(1)(a) Florida Statutes, every insurance policy complying with the security requirements of §627.733 Florida Statutes shall provide medical benefits of "[e]ighty percent of all reasonable expenses for necessary medical, surgical, X-ray, dental, and rehabilitative services..." The Fifth District Court of Appeals in Hunter v. Allstate Insurance Company, 498 So.2d 514, 516 (Fla. 5th DCA 1986), held that "[t]he cost of transportation for medical treatment constituted a "reasonable expense for necessary medical services," thus properly awarded under section §627.736(1)(a)." In reaching this holding, the court looked to the analogous provisions of the workers compensation law, §440.13(5) Florida Statutes which provides:

> (5) An injured employee is entitled, as a part of his remedial treatment, care, and attendance, to reasonable actual cost of transportation to and from the doctor's office, hospital, or other place of treatment by the most economical means of transportation available and suitable in the individual case. When the employee is entitled to such reimbursement for

> transportation by private automobile, it shall be presumed, in the absence of proof, that the actual costs is the amount allowed by the state to employees for official travel.

(Emphasis added).

This court takes judicial notice that the State of Florida reimburses state employees for business travel at the rate of 29 cents per mile, as does the Florida Worker's Compensation Statute. Therefore, this Court expressly finds that Security National Insurance Company's reimbursement of 34.5 cents per mile for the costs of transportation associated with medical treatment under §627.736(1)(a) is reasonable as a matter of law.

This Court further holds that it does not have "primary jurisdiction" as this matter is better determined by an administrative agency, specifically the Department of Insurance.

This Court further finds that the Plaintiff's claim is inappropriate for class action treatment. The adjudication of this matter as a class action would require this Court to consider the individual facts surrounding PIP claims of thousands of Security National policyholders, as well as the defenses of the insurer to each of those claims. As such, Plaintiff has not

satisfied the prerequisites of Rule 1.220 Florida Rules of Civil Procedure. (R.Vol. I, pp. 105-107).

SUMMARY OF ARGUMENT

ISSUE I The Fourth District Court of Appeal's decision in this case expressly and directly conflicts with the Fifth District Court of Appeal's decision in *Hunter v. Allstate* on the same legal issue, to wit: whether Florida's PIP statute requires auto insurers to reimburse insureds for personal transportation costs incurred in obtaining medical care. The Fourth District interpreted the language of the PIP statute at issue and concluded that the statute does not require auto insurers to pay this expense. The Fifth District reached a contrary result in *Hunter*.

Respondent Security National contends that the Fourth District's decision in this case should be approved because the Fourth District correctly interpreted the 'medical benefits' provision of the PIP statute. When construing a statute, a court must look first to the statutory language which is the best indicator of the legislature's intent. The 'medical benefits' provision requires auto insurers to pay "eighty percent of all reasonable expenses for . . . medically necessary ambulance . . . services." §627.736(1)(a), Fla. Stat. (2001). The statute does not reference any other type of transportation costs, and its plain language governs. Thus, as the Fourth District

properly concluded, auto insurers are not required to reimburse insureds for personal mileage expenses they incur in obtaining medical treatment.

Contrary to Petitioner Malu's position, this Court's decision in *Mobley v. Jack & Son Plumbling* does not support a different result. In *Mobley*, this Court had to determine whether personal transportation costs were recoverable by injured workers under the worker's compensation statute. Given the exceptionally broad scope of the worker's compensation statute, the Court held that transportation costs incurred by injured workers were reimbursable expenses. The Fifth District relied on *Mobley* for its holding in *Hunter* that personal transportation costs are recoverable under the PIP statute. The Fifth District concluded — with no significant analysis — that the PIP statute and the worker's compensation statute are analogous; therefore *Mobley* resolves the legal question in this case, i.e., whether the PIP statute requires reimbursement of personal transportation costs.

The Fifth District's reasoning fails because the statutes are not analogous in scope. The worker's compensation statute is interpreted to provide benefits to injured workers for virtually every type of expense arising from an employee's injury because, in exchange for those benefits, workers gave up their right to bring a tort action against their employers for injuries sustained on the job. As this Court stated in *Mobley*, the injured worker is not to bear *any* expense associated with the injury. On the other hand,

the PIP statute places economic responsibility on both the auto insurer and the insured. The auto insurer pays eighty percent of the medically necessary treatment the insured receives as the result of an automobile accident and the insured pays the remaining 20 percent. In addition, the auto insurer is not obligated to pay more than the $10,000 limit of liability on most policies and the insured is required to pay the deductible if one applies. Thus, unlike the worker's compensation statute, the PIP statute was not designed to cover every expense associated with an automobile accident. In short, this Court's decision in *Mobley* is not controlling.

Lastly, Petitioner Malu relies on the rule of statutory construction regarding legislative inaction for the conclusion that the Florida Legislature must agree with the Fifth District's analysis in *Hunter*. The legislature has taken no action on the issue since the Fifth District decided *Hunter*, thus the legislature intended auto insurers to pay for personal transportation costs. The problem for Malu is the long-standing rule that this Court has announced again and again — i.e., a court does not resort to rules of statutory construction when the statute at issue is unambiguous. As detailed above, the PIP statute is clear; auto insurers must pay for transportation costs arising from medically necessary ambulance services. The statute makes no reference to personal transportation costs, and for a court to conclude that such costs are nonetheless reimbursable, it would have to create a statutory obligation out of whole cloth. The

Fourth District recognized that the plain statutory language of the 'medical benefits' provision governs this dispute, and its decision in this case that personal transportation costs are not reimbursable should be affirmed.

ISSUE II Petitioner Malu argues that the Fourth District exceeded the scope of its appellate review when it interpreted the PIP statute because entitlement to transportation benefits had not been contested in the trial court. The Fourth District, however, properly relied on the Tipsy Coachman rule to affirm the trial court's ruling on a different legal theory. The facts necessary to support the Fourth District's decision were of record, which is the key requirement for applying the Tipsy Coachman rule. In fact, both parties cited the *Hunter* case and the trial court, as the Fourth District noted, was constrained to abide by that decision. The Fourth District did nothing more than disagree with *Hunter* on the interpretation of the PIP statute, which is clearly within its purview.

ISSUE III In this point on appeal, Petitioner Malu contends that the trial court erred in applying the doctrine of primary jurisdiction as an additional basis to dismiss her complaint. As detailed in text, Respondent Security National is not pursuing this argument as grounds for affirming the final order of dismissal.

ISSUE IV In the event this Court approves the Fifth District's decision in *Hunter* rather than the Fourth District's decision on review, Respondent Security National

maintains that the trial court's ruling on class certification is an alternative basis to affirm the dismissal. Petitioner Malu argues that the trial court erred on the class certification issue because the court ruled without first permitting discovery. It is clear, however, from the face of the complaint that the reasonableness of a particular mileage rate cannot be decided on a class basis. What a reasonable mileage rate is will vary in each case. Determining a reasonable mileage rate is no different than determining whether a medical procedure is medically necessary. These are issues which must be determined on a case by case basis. Thus, the trial court properly dismissed Petitioner Malu's complaint on grounds that she failed to plead a viable class action.

ARGUMENT

Standard of Review

The issue on review is one of statutory construction. The Fourth District Court of Appeal interpreted the PIP statute to exclude transportation costs as a reimbursable expense incidental to an insured's medical treatment. The Fifth District arrived at a conflicting interpretation of the statute in *Hunter*. Whether the Fourth District correctly interpreted the PIP statute is a question of law which is reviewed *de novo*. "Judicial interpretation of Florida statutes is a purely legal matter and therefore subject to *de novo* review." *Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So. 2d 376, 377 (Fla. 5th

DCA 1998). *See also, e.g., Fitzgerald v. South Florida Hospital District*, 840 So. 2d 460, 461 (Fla. 4th DCA 2003) (the interpretation of a statute is a matter of law subject to *de novo* review); *University of Florida, Bd. Of Trustees v. Sanal*, 837 So. 2d 512, 513 (Fla. 1st DCA 2003) (the construction of a statute is reviewable *de novo*).

ISSUE I The Fourth District Court of Appeal correctly concluded that the PIP statute does not provide for the reimbursement of transportation costs such as mileage

A. The PIP statute limits reimbursable transportation costs to medically necessary ambulance services

In the decision below, the Fourth District Court of Appeal interpreted the "medical benefits" provision of the PIP statute. Florida's PIP statute requires automobile insurers to pay the following medical benefits:

> Eighty percent of all reasonable expenses for medically necessary medical, surgical, X-ray, dental and rehabilitative services, including prosthetic devices, and medically necessary ambulance, hospital, and nursing services.

§627.736(1)(a), Fla. Stat. (2001). Petitioner Malu contends that this provision of the PIP statute requires insurers to reimburse insureds for personal transportation costs, including a mileage allowance when an insured drives his or her own car to obtain medical treatment. As the Fourth District correctly noted, however, "the statute does not provide for the cost of driving to obtain medical treatment." *Malu v. Security National Insurance Co.*, 848 So. 2d 373 (Fla. 4th DCA 2003). In fact, the statute makes

no reference to transportation other than transportation by ambulance. The Fourth District's factual premise is undisputedly accurate, i.e., "the legislature specifically included transportation by ambulance, but did not mention any other type of transportation in the PIP statute." *Id* at 374.

The question then is whether there is any proper legal basis to add benefits (by judicial interpretation) not specifically provided for by the Florida Legislature in the PIP statute. The Fourth District concluded that the statute should be construed as written. The statute is clear and unambiguous. Insurers must pay "[e]ighty percent of all reasonable expenses for . . . medically necessary ambulance . . . services." §627.736(1)(a), Fla. Stat. (2001). No other transportation costs are mentioned.

In support of its interpretation, the Fourth District cited the rule of statutory construction know as *expressio unius est exclusio alterius* — i.e., the mention of one thing implies the exclusion of another. *Malu*, 848 So. 2d at 374. In applying this rule of construction, the Fourth District reasoned that the "mention of one type of transportation implies the exclusion of other types." *Id.* Petitioner Malu denounces the Fourth District's use of this rule of statutory construction on grounds that it is "notoriously unreliable." Malu Initial Brief, pp. 23-24.

Petitioner Malu's argument in that regard is unavailing for two reasons. First, the "medical benefits" provision of the PIP statute at issue does not need interpretation or

the application of any rule of statutory construction. The statute clearly makes no provision for the reimbursement of personal transportation costs.[2] Second, to the extent that the rule supports what is evident from the statute's wording, this Court has relied on the rule as a viable tool for analyzing statutes. *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996). It is difficult to believe that this Court has previously and repeatedly relied on a rule of statutory construction which is "notoriously unreliable." *See also, e.g., Grenitz v. Tomlian*, 2003 WL 21290887 (Fla. June 5, 2003) (applying the *expressio unius est exclusio alterius* rule to interpret a statute and holding that legislature intend to exclude what it did not mention); *Mosher v. Anderson*, 817 So. 2d 812 (Fla. 2002) (applying the rule; the inclusion of written payable-on-demand loans in the statute implies the exclusion of oral payable-on-demand loans).

In *Hunter*, the Fifth District went beyond the plain meaning of the statute to conclude that the legislature must have intended for insurers to pay personal transportation costs. *Hunter v. Allstate Insurance Company*, 498 So. 2d 514, 516 (Fla. 5th DCA 1986). The Fifth District reasoned that transportation costs constitute a

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[2]The Third District Court of Appeal recently considered the same issue in *Padilla v. Liberty Mutual Insurance Co.*, 2003 WL 21697054 (Fla. 3d DCA July 23, 2003). The Third District agreed with the Fourth District's analysis in *Malu* and adopted it as its own, i.e., the PIP statute does not provide for reimbursement of personal transportation costs. *Id*. at *2. Like the Fourth District, the Third District certified conflict with *Hunter*. *Id.*

"reasonable expense" for obtaining a "necessary medical service." *Id.* Contrary to the *expressio unius est exclusio alterius* rule of statutory construction, the Fifth District then stated that personal transportation costs must be covered under the statute because the cost of ambulatory services are specifically covered. *Id.* According to the Fifth District, "it is illogical that a person could be transported by an ambulance to receive services and be recompensed, but not be reimbursed if the person traveled in his own vehicle." *Id.*

The Fifth District erred in its analysis on this point. It is not illogical for an insured to be reimbursed for the cost of ambulance services and not for the cost of personal transportation. An insured is reimbursed for ambulance services only when the use of an ambulance is "medically necessary." §627.736(1)(a), Fla. Stat. (2001). It is important to note at this point that the "medical benefits" provision of the PIP statute has been slightly, but significantly, modified since the Fifth District issued its decision in *Hunter*. The word "medically" was inserted in the following two locations:

> Eighty percent of all reasonable expenses for ***medically*** necessary medical, surgical, X-ray, dental and rehabilitative services, including prosthetic devices, and ***medically*** necessary ambulance, hospital, and nursing services.

§627.736(1)(a), Fla. Stat. (2001). Thus, an insured may not use an ambulance as his or her personal taxi service to and from medical appointments at the expense of the insurer.

Instead, the insurer is only required to pay for ambulance services when the insured is unable — for medical reasons — to transport him or herself to the medical appointment.

In short, as shown by the statute's plain language, the legislature intended for insurers to pay some (but not all) transportation costs incurred by the insured. The insurer must pay for transportation costs when it is medically necessary for the insured to be transported via ambulance. Any other interpretation of the medical benefits provision of the PIP statute is not supported by the statute's plain meaning. This Court has held many times that the plain meaning of a statute should govern and that no interpretation is necessary when the statute is clear. As this Court noted in *Acosta v. Richter*, 671 So. 2d 149, 153 (Fla. 1996), the polestar of statutory construction is "the plain meaning of the statute at issue." In this case, the Fourth District properly construed the 'medical benefits' provision of the statute and its decision holding that personal transportation costs are not reimbursable should be affirmed.

B. This Court's decision in *Mobley* is not applicable to the PIP statute

The only other basis for Petitioner Malu's argument that auto insurers must pay for personal transportation costs is this Court's opinion in *Mobley v. Jack & Son Plumbing*, 170 So. 2d 41 (Fla. 1964). The Fifth District concluded in *Hunter* that *Mobley* is applicable and controlling on this issue. *Hunter*, 498 So. 2d at 515-516. In *Mobley*, this Court had to determine whether the worker's compensation statute entitled

an injured worker to reimbursement for personal transportation costs incidental to medical care. *Mobley*, 170 So. 2d at 46-47. The exact statutory provision at issue was the requirement that an employer provide the injured employee with "such remedial treatment, care and attendance as the injury shall require." *Id.* This Court held in *Mobley* that the worker's compensation statute must be interpreted to include reimbursement for personal transportation costs because "the Legislature intended that an injured employee be given medical treatment at the expense of the employer-carrier and without expense to himself." *Mobley*, 170 So. 2d at 47.

In *Hunter* — with virtually no analysis to support the proposition — the Fifth District accepted the insured's argument that "the worker's compensation law is analogous to no-fault insurance coverage, and thus the same extent of coverage should apply." *Hunter*, 498 So. 2d at 515. According to the Fifth District, personal transportation costs are reimbursable under the PIP statute because, as this Court held in *Mobley*, those same costs are reimbursable under the worker's compensation statute. The Fifth District's only support for applying the *Mobley* holding in the context of transportation costs under the PIP statute is the general legal proposition that the PIP statute is construed liberally in favor of the insured. *Id.* at 516. As detailed next, the Fifth District failed to recognize that the framework of the PIP statute is different from

the worker's compensation such that this Court's decision in *Mobley* is not dispositive of the issue in this case.

Unlike the worker's compensation statute, the PIP statute is not set up to pay 100 percent of the insured's medical expenses. As this Court noted in *Mobley*, the worker's compensation statute provides an injured employee "medical treatment at the expense of the employer-carrier *and without expense to himself*." *Mobley*, 170 So. 2d at 47. In the PIP context, the insured is required to pay 20 percent of his or her expenses and all of his or her expenses above the $10,000.00 limit of liability. The PIP statute did not create a system where the insured bears no portion of the reasonable expenses incurred for medical care.

In addition, the worker's compensation statute requires an employer to provide an injured employee "treatment." Thus, as this Court noted in *Mobley*, treatment offered by the employer at an out of state clinic would be "an empty gesture" if the employer failed "to also furnish travel expenses." *Mobley*, 170 So. 2d at 47. Under the PIP statue, insurers are not required to provide treatment, but rather, auto insurers are required to pay for certain enumerated medical benefits — only one of which is related to transportation, i.e., medically necessary ambulance services.

Lastly, The worker's compensation statute is meant to cover virtually *every* type of expense associated with or arising out of an employee's on-the-job injury. For

example, an injured employee may receive (1) child care and housekeeping services, *Stables v. Rivers*, 562 So. 2d 784 (Fla. 1st DCA 1992); (2) a specially equipped automobile with a wheelchair lift, *Timothy Bowser Const. Co. v. Kowalski*, 605 So. 2d 885 (Fla. 1st DCA 1992); (3) funds to purchase a hot tub, *Kubber v. Max Davis Associates & Feisco*, 603 So. 2d 137 (Fla. 1st DCA 1992); and (4) attendant care, lawn care and reimbursement for a portion of utility expenses, *Frederick Electronics v. Pettijohn*, 619 So. 2d 14 (Fla. 1st DCA 1993). The worker's compensation statute is broad in scope because it is the injured worker's sole tort remedy. *Byrd v. Richardson-Greenshields Securities, Inc.*, 552 So. 2d 1099, 1100 (Fla. 1989).

The worker's compensation statute and the PIP statute are not sufficiently analogous to apply the *Mobley* holding here. The PIP statute is not as broad in scope, thus it is legally unsound to conclude that personal transportation costs are recoverable under the PIP statute merely because those same benefits are recoverable under the worker's compensation statute. The PIP statute must be interpreted separately and independently based on its plain language, as the Fourth District did in the decision on review. The PIP statute does not require auto insurers to pay personal transportation costs, and the *Mobley* decision does not support a different result where the statutory schemes are not similar in purpose or scope.

C. Legislative inaction is irrelevant where the statute at issue is clear on its face

Lastly, Petitioner Malu argues that the PIP statute must be interpreted to provide for the reimbursement of personal transportation costs because the Florida Legislature never amended the statute following the Fifth District's decision in *Hunter*. According to Petitioner Malu, it must be presumed that the Legislature agreed with *Hunter's* interpretation of the statute based on its inaction. The problem for Petitioner Malu is that she must resort to rules of statutory construction in order to make any argument that auto insurers are required to pay personal transportation costs. Petitioner Malu faces this problem because there is no language in the statute itself which can arguably be said to address the reimbursement of personal transportation costs.

Rules of statutory construction never come into play when the statute is clear on its face. *M.W. v. Davis*, 756 So. 2d 90 (Fla. 2000) (there is no reason to resort to rules of statutory construction and interpretation when a statute is clear and unambiguous). As this Court held in *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 899 (Fla. 1996), courts must "look first to the statute's plain meaning." If the statutory language at issue is unambiguous, no further interpretation is necessary. *Id. See also, e.g., Capers v. State*, 678 So. 2d 330, 332 (Fla. 1996) (plain meaning of the statutory language is a court's first consideration); *St. Petersburg Bank & Trust Co. v. Hamm*,

414 So. 2d 1071 (Fla. 1982) (legislative intent is determined primarily from the language of the statue; plain meaning is the first consideration). "Only when a statute is of doubtful meaning should matters extrinsic to the statute be considered in construing the language employed by the legislature." *Capers*, 678 So. 2d at 332. The 'medical benefits' provision of the statute at issue here clearly requires auto insurers to pay one type of transportation costs, i.e., medically necessary ambulance services. The statute's plain meaning requires nothing more.

Petitioner Malu skips the first step of statutory review altogether, relying exclusively on the Fifth District's decision in *Hunter* — an equally flawed analysis. The Fifth District clearly fails to examine the statutory language at issue. The Fifth District missed *the* threshold inquiry, i.e., whether the 'medical benefits' provision of the PIP statute expressly or impliedly provided for the reimbursement of personal transportation costs. The Fifth District, like Petitioner Malu, erred in its analysis. The Fourth District's decision in this case, however, properly adheres to this Court's directive to "look first to the statute's plain meaning." *Moonlit, supra*; *Capers, supra.* Given the Fifth District's failure to look to the statute's plain language, the rule of statutory construction relied on here by Petitioner Malu does not apply.

ISSUE II The Fourth District properly applied the Tipsy Coachman rule in reaching its decision

Petitioner Malu contends that the Fourth District violated the Tipsy Coachman rule when it determined that the trial court's dismissal of the complaint in this case was wrong for the reason stated by the trial court, but right as a matter of law based on a different legal theory. Contrary to Petitioner Malu's position, the Fourth District acted well within its scope of appellate review when it determined that the trial court's ruling should be upheld based on a different *legal* theory. "When in the opinion of an appellate court a ground exists for upholding a decree which is challenged on appeal the decree will be affirmed although the reasons relied on by the trial court are rejected." *Storz Broadcasting Co. v. Courtney*, 178 So. 2d 40, 42 (Fla. 3d DCA 1965).

Petitioner Malu argues that Security National did not contest entitlement to the mileage payments in the trial court, thereby restricting the Fourth District from construing the statute at issue in the case. According to Petitioner Malu, the entitlement argument is not "of record." What must be of record, however, are the facts that support the legal ruling — a point demonstrated by the case law Petitioner Malu cites in her initial brief. For example, in *State, Dept. of Revenue v. Morris*, 736 So. 2d 41, 42 (Fla. 1st DCA 1999), the First District Court of Appeal held that the Tipsy Coachman rule applies when the argument at issue is "supported by evidence in the record." *See also, e.g., Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999) (appellate court obliged to affirm a judgment where "*any* theory or principle

of law" supports the judgment based on the evidence in the record). (Emphasis in original).

In the present case, the facts are undisputed because the case was adjudicated at the motion to dismiss stage. Respondent Security National contended below and on appeal that the allegations in Petitioner Malu's complaint must be accepted as true and, nonetheless, the complaint failed to state a cause of action as a matter of law. The Fourth District also concluded that Petitioner Malu's compliant failed to state a cause of action, a conclusion the district court reached based on its interpretation of the statute cited by Petitioner Malu. It is well-settled that "[t]he task of the appellate court is to determine whether the order is correct, not whether the underlying rationale is correct." Padovano, P. J., FLORIDA APPELLATE PRACTICE, §18.2 (2nd ed.). Based on this long-standing appellate canon, "a decision of a trial court will generally be affirmed if it is correct under any applicable theory of law." *Swanson v. Gulf West International Corp.*, 429 So. 2d 817, 819 (Fla. 2d DCA 1983).

The Fourth District agreed with the trial court's ultimate disposition of the case but, having reviewed the undisputed facts, predicated its decision on a different legal rationale. The Third District did the same in *Padilla v. Liberty Mutual Insurance Co.*, 2003 WL 21697054 (Fla. 3d DCA July 23, 2003). The Fourth District in this case and the Third District in *Padilla* recognized that the pivotal question was the proper

uinterpretation of the PIP statute. Moreover, in the trial proceedings in this case, both Petitioner Malu and Respondent Security National cited the Fifth District Court of Appeal's decision in *Hunter v. Allstate Ins. Co*, 498 So. 2d 514 (Fla. 5th DCA 1986). Petitioner Malu cited *Hunter* in her complaint. The Fourth District did nothing more than issue an opinion which conflicts with the *Hunter* decision on the underlying issue in this case, i.e., whether the PIP statute allows for the reimbursement of personal transportation costs.

Lastly, Petitioner Malu's assertion that Respondent Security National had no standing to contest the compensability of the personal transportation costs because it had "voluntarily paid" mileage expenses to its insureds is without merit. Security National has an obligation to act in the best interests of its insureds and, like the trial court, Security National was bound to follow the law in *Hunter*. Security National paid mileage costs to its insureds because the state of law at the time required it. Petitioner Malu cannot argue with any credibility that Security National is prohibited from asserting a contrary legal position once a lawsuit is pending or that Security National is bound by its prior conduct despite a change in the law. The fact that Security National followed the law does not defeat the application of the Tipsy Coachman rule. In short, Petitioner Malu's argument that the Fourth District exceeded the scope of proper appellate review should be rejected.

ISSUE III The *Padilla* decision resolved the issue of primary jurisdiction

As her third point on appeal, Petitioner Malu addresses the trial court's ruling that the Department of Insurance has primary jurisdiction over this dispute. At the time the trial court made that ruling, no insured had sought to invoke the Department of Insurance's jurisdiction on the issue of mileage rates. Since then, the Department of Insurance declined to take jurisdiction of the dispute and that decision was upheld on appeal by the First District Court of Appeal in *Padilla v. Liberty Mutual Insurance Company*, 832 So. 2d 916 (Fla. 1st DCA 2002). The First District held that Department of Insurance "has no statutory authority, rulemaking or otherwise, to set mileage reimbursement rates payable as benefits under section 627.736(1)(a)." Although Respondent Security National disagrees with the First District's reasoning in *Padilla*, Respondent accepts the ruling as binding and abandons the doctrine of primary jurisdiction as an alternative basis to uphold the trial court's order of dismissal in this case. As set forth next, however, the trial court's dismissal of Petitioner Malu's complaint on class certification grounds was proper; thus, the order of dismissal should be affirmed.

ISSUE IV The trial court properly exercised its discretion in denying class certification

Petitioner Malu's last point on appeal is that the trial court erred in dismissing the class action allegations in her complaint because no discovery had been conducted. The trial court recognized, however, that Petitioner Malu will never be able to establish typicality.[3] In order to meet the typicality requirement, the plaintiff must "allege[] that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented . . .*irrespective of the varying fact patterns which underlie the individual claims*." 1 H. Newberg, *Newberg on Class Actions*, § 3-13 at 3-77 (3d ed. 1992). If the plaintiff's claim involves facts that are unique to her case or unique defenses exist, the trial court may deny class certification. *Id.*

In this case, Petitioner Malu seeks to have the court make a judicial determination that any mileage rate less than 50 cents per mile is unreasonable, yet the cost of transportation will vary in each individual case. For example, if an insured chooses to obtain treatment from an out-of-town provider when a local one is available, the insurer will be required to consider the unique facts of the situation to determine whether it is proper to pay the mileage rate for the entire trip. Similarly, disputes with each putative class member may exist with respect to distance to and from the medical appointments,

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[3]In the event this Court affirms the Fourth District's holding that the PIP statute does not provide for reimbursement of personal transportation costs, this issue on appeal will be moot. Respondent Security National addresses the class certification issue because Security National believes that it presents another basis to affirm the trial court's dismissal of the complaint in this case.

the routes taken to those appointments, the type of private automobile being used and gas rates in the community. Given these individual considerations, Petitioner Malu cannot meet the typicality requirement. *Ammons v. American Family Mutual Ins. Co.*, 897 P.2d 860, 863 (Co.App. 1995) (affirming the denial of class certification in a mileage rate case on grounds that individual issues predominated over class issues such that the plaintiff would never meet the typicality requirement).

Moreover, in *Hunter*, the Fifth District Court of Appeal noted that reimbursement for travel costs contemplated reimbursement for "actual costs." Actual costs for an insured's use of a private automobile will necessarily take into consideration many factors, including but not limited to the type of vehicle, the vehicle's gas mileage, the cost of gas in the particular area, city miles vs. highway miles, and whether the insured has special transportation needs.[4] Whether a particular mileage rate is reasonable will have to be decided on a case by case basis just like whether a particular insured's medical treatment is reasonable.

This Court reached this same conclusion when it considered the reasonableness of a mileage rate in *Mobley v. Jack & Son Plumbing*, 170 So. 2d 41 (Fla. 1964). In

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[4]In *Ammons, supra*, a Colorado appellate court held that "the establishment of such a rate in not within the province of the courts." 897 P.2d at 864. The court noted that many different factors played a role in determining a proper mileage rate such that it was "inappropriate" for the court to "judicially . . . legislate a specific rate as reasonable in all cases." *Id.*

Mobley, this Court held that transportation costs were recoverable under the worker's compensation statute, but specifically noted that what constitutes a reasonable mileage rate would have to be determined on a case by case basis:

> We have greater difficulty, however, upholding the portion of the rule that establishes seven and one-half cents per mile as the sum to be paid for travel by private automobile. We have considered the provisions of Section 440.13(3)(a), which authorize the Commission to adopt a schedule of charges for medical treatment and services, but have concluded that the wording of the subsection authorizes the adoption of a schedule only for medical service and treatment rendered claimants by others. ***There is no other grant of authority to the Commission by the Legislature that authorizes the Commission to legislate the amount to be allowed for such travel. Although the seven and one-half cents per mile established in the rule seems reasonable, and its establishment serves an excellent purpose by making proof unnecessary, the fact remains that this portion of the rule is legislative in nature, and enacted without authority. It must fall. This will mean that, unless the parties in workmen's compensation proceedings stipulate on a mileage rate, the reasonable actual cost of such travel expenses will have to be proved*** **just as any other factual issue**.

Mobley, 170 So. 2d at 47. *See also, e.g., Padilla v. Liberty Mutual Insurance Co.*, 832 So. 2d 916 (Fla. 1st DCA 2002) ("Under the statutory scheme, the court's decide, *case by case*, whether insurers have met their obligations to pay personal injury protection benefits under section 627.736(1)(a).").

Because mileage rates are so unique and will vary under virtually every fact pattern, the issue may not be resolved in one lawsuit by one court for all insureds. Doing so would be judicial legislation. In cases involving such individual considerations,

like the one at bar, class certification is not proper. Accordingly, the trial court correctly dismissed Petitioner Malu's class action allegations. *Harrell v. Hess Oil and Chemical Corp.*, 287 So. 2d. 291, 293-294 (Fla. 1973) (trial court properly dismissed class action complaint where plaintiff failed to meet pleading requirements).

CONCLUSION

Based on the foregoing facts and authorities, Respondent Security National Insurance Company respectfully submits that the Fourth District Court of Appeal's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Respondent's Answer Brief was mailed this 18th day of October, 2003 to:

_____

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this answer brief complies with the type style and size requirement of Fla.R.App.P. 9.210. Respondent utilizes herein a Times New Roman 14-point font.

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