IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1327

SANDRA MALU,

Petitioner,

vs.

SECURITY NATIONAL
INSURANCE COMPANY,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER

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INTRODUCTION AND STATEMENT OF JURISDICTION

This case is before the Court on review of a decision of the Fourth District Court of Appeal certifying an express and direct conflict with a decision of another District Court of Appeal on the same question of law. This Court has discretionary jurisdiction. *See* Art. V, § 3(b)(4), Fla. Const.

In its opinion, while acknowledging that the order under review was erroneous for the reasons argued by Petitioner, the Fourth District nonetheless affirmed the dismissal of her claim, *sua sponte* invoking the "tipsy coachman" doctrine. In so doing, despite the fact that the issue of medical travel costs as a compensable benefit under the PIP statute was not in dispute, the Fourth District nevertheless held that such costs are not permitted under the PIP statutory scheme. In so holding, the Fourth District expressly disagreed with an opinion of the Fifth District in ***Hunter v. Allstate Insurance Co.***, 498 So. 2d 514 (Fla. 5th DCA 1986) and certified conflict accordingly.

The question presented in this case, which will affect motor vehicle insureds statewide, is whether, under the PIP statutory scheme, an insured is entitled to payment for the cost of transportation in connection with reasonable and necessary medical treatment as an allowable benefit pursuant to F.S. § 627.736(1)(a). This question is significant because the Fourth District's opinion in this case has essentially eliminated

an entire category of PIP benefits, which, until this decision, has been recognized as an allowable and routinely paid benefit in this State. The Fourth District's opinion was rendered *sua sponte* on a record that did not present this issue and despite the fact that, since the time that ***Hunter*** was decided back in 1986, not a single insurance carrier in the State has ever questioned the right of its insureds to receive these benefits.

As will be argued in detail below, it is the Petitioner's position that the Fourth District's reasoning is not legally sound and should therefore be rejected. In doing so, this Court is respectfully urged to reaffirm the vitality of the ***Hunter*** opinion and, in the process, approve of the judicial interpretation placed upon the PIP Statute by the Fifth District back in 1986, which construction has been legislatively approved of for the past seventeen years.

Throughout this brief, Petitioner, the Appellant below, will be referred to as "Plaintiff." The Respondent, the Appellee below, SECURITY NATIONAL INSURANCE COMPANY, will be referred to as "Security National."

References to the documents included in the appellate record will be designated "R." followed by the appropriate page in the record.

STATEMENT OF THE CASE AND FACTS

PIP Mileage Dispute

Plaintiff was insured under a private passenger automobile insurance policy issued by Security National. (R. 1). After sustaining injuries in a motor vehicle accident, Plaintiff made a claim for Personal Injury Protection ("PIP") benefits under her insurance policy. (R. 1). Among the benefits sought was payment for the use of her personal automobile to travel to and from her medical providers. (R. 2). According to its usual and customary practice, Security National **unilaterally** paid Plaintiff a standard, predetermined amount of 34.5 cents per mile as medical travel costs.[1] (R. 2-3).

After discovering the amount that Security National paid per mile for the use of her vehicle, Plaintiff filed a class claim in the Broward County Circuit Court, alleging that she was entitled to be paid more than 34.5 cents per mile for medical transportation costs. (R. 1-9). Plaintiff's putative class action sought declaratory relief and damages for breach of contract based upon a violation of Florida's PIP statute,

[1] In light of the fact that Security National voluntarily paid medical travel benefits to Plaintiff in this case, the underlying compensability of this benefit under the PIP statute was never at issue. Instead, the issue was simply whether Plaintiff had a right under the PIP Statute to challenge the amount of the standard rate paid by Security National to her and all of its other insureds.

§ 627.736, Florida Statutes. (R. 1-9).

Mileage Claims' Factual Predicate

In support of her claim, Plaintiff relied upon the National Transportation Statistics promulgated by the U.S. Department of Transportation and the Statistical Abstract of the United States published by the U.S. Department of Commerce, which both indicate that while 34.5 cents per mile may have been a reasonable figure in the late 1980's and early 1990's, this amount is no longer legitimate as a realistic estimate of the total cost per mile to operate a private passenger automobile. (R. 10-14; 15-20). Instead, according to the data, a reasonable mileage rate is in the range of 50 cents per mile. (R. 8; 20). Thus, Plaintiff alleged that the mileage rate paid by her insurer for medical transportation costs was not reasonable and that she was entitled to be reimbursed at a higher rate. (R. 1-9).

Defendant's Arguments

In response to Plaintiff's Complaint, Security National sought dismissal of the claim, arguing that the amount paid to its insureds was reasonable as a matter of law. (R. 26-31). Ignoring the governmental data attached to Plaintiff's Complaint, Security National contended that various other statutory, administrative, and industry-wide transportation expense reimbursement schemes in effect during the calender year

2000,[2] proved that the rate paid by Security National was, as a matter of law, reasonable. (R. 27).

Moreover, Security National argued that Plaintiff's claim should be dismissed under the doctrine of primary jurisdiction because, according to Security National, "the Department of Insurance has primary jurisdiction to determine reasonable rates of reimbursement for transportation under Fla. Stat. § 627.736(1)." (R. 27-28).

Hearing on the Motion to Dismiss

During the motion to dismiss hearing, when the trial court inquired of Plaintiff what authority the court had to "interject [itself] into a contract between two consenting contractual individuals," her counsel responded that the case was no different than any other breach of insurance contract claim and that the issue of what was a "reasonable and necessary" expense under the PIP statute was an issue for the finder of fact to determine.[3] (T. 4-6; 12-13). Plaintiff's counsel pointed out that the issue was a standard PIP dispute and that, like every other PIP case, each party would argue and present expert testimony based on various data and statistics regarding a

[2] Incidentally, Plaintiff's motor vehicle accident took place in the calender year 2001. (R. 1).

[3] Apparently, the trial court was under the misconception that the insurance policy specifically provided for the amount that was to be paid for medical travel costs. (T. 6). In fact, this is not the case.

reasonable medical travel mileage rate, with the ultimate determination to be made by a jury. (T. 12-13).

After hearing arguments of counsel, the trial court entered an order of dismissal with prejudice finding that, as a matter of law, the 34.5 cents per mile that Security National paid to its insureds was reasonable. (R. 105-107). Additionally, it concluded that it did not have "primary jurisdiction" as to the issues presented in the lawsuit and that the Department of Insurance (DOI) was the appropriate forum to consider Plaintiff's claim. (R. 106). Lastly, despite the fact that no evidence was presented regarding the class action issue, the court found that Plaintiff's claim was inappropriate for class action treatment. (R. 107). It is from this order that Plaintiff appealed to the Fourth District.

Proceedings in the Fourth District

On appeal, Plaintiff raised three issues. As her first and primary argument, she argued that the trial court erred in concluding that the amount that Security National paid to its insureds for medical travel costs was reasonable as a matter of law. Plaintiff asserted that such a finding was not susceptible to determination as a matter of law, but rather could only be made by the trier of fact and that by dismissing Plaintiff's claim on the grounds that it did, the trial court went far beyond the four corners of the Complaint and made improper factual findings at the motion to dismiss stage of the

proceeding and basically usurped the function of the jury.

Secondly, Plaintiff challenged the trial court's ruling regarding the applicability of the "primary jurisdiction doctrine," arguing that the Department of Insurance is not authorized to and has never engaged in the business of regulating PIP mileage claims brought by insureds and has no ability to resolve the dispute between Plaintiff and Security National.

Finally, Plaintiff argued that the trial court did not have sufficient information to consider whether a class action could be maintained and thus had abused its discretion in denying class certification prematurely.

In its opinion, the Fourth District expressly addressed only the first issue raised by Plaintiff regarding the impropriety of the trial court's finding that the amount paid by Security National was reasonable as a matter law. *See* ***Malu v. Security National Insurance Co.***, 848 So. 2d 373 (Fla. 4th DCA 2003). While agreeing with Plaintiff that the trial court was not authorized to consider facts extraneous to the complaint and had gone beyond the four corners of the complaint in dismissing the case on the grounds that it did, the Fourth District nonetheless affirmed the dismissal of Plaintiff's claim on grounds that it was under a duty to affirm if an alternative theory supported affirmance. ***Malu*** at 374.

In support of affirmance, the Fourth District stated that it did not believe that

automobile transportation expenses were compensable under the PIP statute and elaborated its reasoning as follows:

> Our reasoning is based on the fact that the legislature specifically included [in § 627.736(1)(a)] transportation by ambulance, but did not mention any other type of transportation in the PIP statute. The mention of one type of transportation implies the exclusion of other types. *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996)("Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another.").

Malu at 374.

Moreover, the Fourth District reasoned that when the legislature has intended to provide for automobile transportation expenses to obtain medical treatment in a statutory scheme, it has specifically made such expenses payable in the statutory language. As examples, the ***Malu*** panel cited to a former version of the workers' compensation statute, F.S. § 440.13(5)[4] and to the statutory scheme providing for benefits for birth-related neurological injuries, F.S. § 766.31(1)(a).

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[4] Significantly, the express provision for transportation costs, which was added to the workers' compensation statute in 1977, was deleted from the statute when it was amended in 1993. Since this time, the workers compensation statute does not expressly provide for automobile transportation costs. Nonetheless, as argued below in detail and in conflict with the reasoning of the ***Malu*** panel, irrespective of the lack of express authorization within the statute, automobile transportation costs have continued to be an allowable benefit under the workers' compensation statutory scheme. *See* ***Sam's Club v. Bair***, 678 So. 2d 902 (Fla. 1st DCA 1996).

On this basis, the Fourth District expressed its opinion that the PIP Statute does not include transportation expenses sought by Plaintiff in her claim and expressed its disagreement with ***Hunter v. Allstate Insurance Co.***, 498 So. 2d 514 (Fla. 5th DCA 1986), wherein the Fifth District had expressly ruled that such expenses were compensable under the PIP Statute. It is as a result of this express and direct inter-district conflict that this matter appears before this Court.

SUMMARY OF THE ARGUMENT

Point I

The Fourth District's application of the "tipsy coachman" rule was a misapplication of the doctrine since the issue of the compensability of medical travel costs as a benefit under the PIP statute was never at issue in this case.

Point II

The ***Malu*** court overlooked that the Florida legislature has unconditionally approved of ***Hunter***'s interpretation of F.S. § 627.736(1)(a) to include medical travel costs as a "reasonable expense for necessary medical services" by virtue of its failure, over the past seventeen years, to have made any substantive changes to the statutory language contained in the PIP statute. In blindly applying the *exclusio unius est exclusio alterius* maxim, the Fourth District interpreted the PIP statute in a manner that is not only entirely inconsistent with the well-settled policy of Florida courts to construe the Florida No-Fault Act provisions in favor of insureds, but also is adverse to the clear legislative purpose of providing broad PIP coverage for Florida motorists so as to maximize, not minimize, insurance coverage.

Point III

Because the Department of Insurance is not authorized to and has never engaged in the business of regulating PIP mileage claims brought by insureds, the

doctrine of primary jurisdiction has no applicability to this dispute. Moreover, the Department of Insurance is not empowered to award the money damages sought in this breach of contract action and thus has no ability to resolve this dispute. The action initiated by Plaintiff is a standard breach of contract claim, which has historically and customarily been resolved in and by the courts.

Point IV

The trial court did not have sufficient information to decide whether a class action could be maintained and thus abused its discretion in denying class certification prematurely.

STANDARD OF REVIEW

Judicial interpretation of Florida statutes is a purely legal matter and therefore subject to *de novo* review. ***Engineering Contractors Ass'n of South Florida, Inc. v. Broward County***, 789 So. 2d 445 (Fla. 4th DCA 2001); ***Racetrac Petroleum, Inc. v. Delco Oil, Inc.***, 721 So. 2d 376 (Fla. 5th DCA 1998).

ARGUMENT

Point I

THE FOURTH DISTRICT'S DECISION TO APPLY THE "TIPSY COACHMAN" RULE TO THIS CASE WAS A MISAPPLICATION OF THE DOCTRINE BECAUSE THE RECORD DOES NOT SUPPORT THE ALTERNATIVE THEORY UPON WHICH THE CASE WAS DECIDED.

The "Tipsy Coachman" Doctrine

In ***Dade County School Board v. Radio Station WQBA***, 731 So. 2d 638 (Fla. 1999) and again in ***Robertson v. State***, 829 So. 2d 901 (Fla. 2002), this Court addressed the proper application of the "tipsy coachman" doctrine and explained that under this longstanding principle, an appellate court is permitted to affirm a trial court that reaches the right result, but for the wrong reason, so long as there is any basis that would support the judgment in the record. ***Radio Station WQBA*** at 644-645; ***Roberston*** at 906. In ***Robertson***, *supra*, it was emphasized that the key to applying the "tipsy coachman" doctrine is that **the record before the trial court must support the alternative theory or principle of law**. *See also* ***State, Dept. of Revenue ex rel. Rochell v. Morris***, 736 So. 2d 41, 42 (Fla. 1st DCA 1999)(rejecting request to apply "tipsy coachman" rule where argument asserted was not raised below and thus not supported by the record on appeal).

In ***Delissio v. Delissio***, 821 So. 2d 350 (Fla. 5th DCA 2002), Judge Browning wrote a compelling dissenting opinion regarding the impropriety of a *sua sponte* application of the "tipsy coachman" rule by an appellate court on grounds never raised or argued by either party in the trial court or on appeal. The ***Delissio*** dissent recognized that cases in which the "tipsy coachman" doctrine have been applied are scenarios where the opposing party, at some point in the case, advanced the alternative basis for affirmance. ***Id.*** at 355. In explaining why it was improper to utilize the "tipsy coachman" rule where the alternative theory was not presented by the opposing party, Judge Browning stated:

> Here, the parties will for the first time, become acquainted with the argument which forms the basis and rationale of this court's decision upon receipt of the majority's opinion . . . Moreover, in my judgment, when an appellate court affirms a trial court's erroneous ruling by searching for a basis for affirmance not argued by the parties, as the majority does here, an unintended byproduct is the impression that the court is a part of the adversarial process rather than a neutral judicial arbitrator. I realize that an appellate court must act sua sponte on issues involving jurisdiction, public policy, and illegality. However, this case involves the parties' private agreement that does not touch upon these exceptions. Furthermore, when a case is decided on an issue unnoticed to the parties, serious due process considerations are raised. ***Id.*** at 355.

The Record Does Not Support the Alternative Grounds for Affirmance

Plaintiff respectfully submits that the concerns expressed by Judge Browning in ***Delissio*** are valid as is his view that it is unfair, improper, and violative of due process for an appellate court to *sua sponte* invoke the "tipsy coachman" doctrine in order to decide a case on an issue that, until the time that the appellate panel's opinion is issued, is completely foreign to the proceeding.

Such is the situation presented in this case since **the underlying issue of the compensability of medical travel costs under the PIP statute was never at issue in the case**. Security National did not, at any time, in either the lower court or the appellate proceeding, object to paying medical travel costs under the PIP statute. The record is clear that the **only dispute between the parties in this case was the <u>amount</u> of the benefit paid.**

By seeking to invoke the "tipsy coachman" doctrine on the grounds that it did, the Fourth District overlooked that Security National, even if it had wanted to, would not have had standing to raise the issue of the compensability of medical travel benefits under the PIP statute since it **voluntarily paid** these benefits to its insureds (though at a rate thought by Plaintiff to be too low). Consequently, because the record in this case does not support the alternative theory relied upon by the court in affirming the dismissal, the Fourth District's invocation of the "tipsy coachman" rule was a

misapplication of the doctrine.

Point II

BY APPLYING THE MAXIM OF *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS* TO F.S. § 627.736(1)(a) TO CONCLUDE THAT TRANSPORTATION COSTS ARE NOT COMPENSABLE UNDER THE PIP STATUTE, THE FOURTH DISTRICT OVERLOOKED THAT THE LEGISLATURE UNCONDITIONALLY APPROVED OF *HUNTER*'S CONTRARY INTERPRETATION BY VIRTUE OF ITS FAILURE TO DISAPPROVE OF IT.

The Fourth District's opinion in this case is significant because it *sua sponte* casts a doubt upon the once undisputed right of motor vehicle insureds to receive medical travel benefits under the PIP Statute. The compensability of these benefits has never been challenged since the issue was first confronted almost seventeen years ago in ***Hunter v. Allstate Insurance Co.***, 498 So. 2d 514 (Fla. 5th DCA 1986).

The *Hunter* Decision

In ***Hunter***, *supra*, the Fifth District addressed whether an insured is entitled to recover transportation costs incurred in connection with reasonable and necessary medical treatment as a benefit under the PIP Statute. In answering this question in the affirmative, the ***Hunter*** court relied upon the well-settled policy of the courts of

Florida to construe provisions of the Florida No-Fault Act in favor of the insured.[5] ***Hunter*** at 515-516. Moreover, ***Hunter*** looked to workers' compensation law, which was found to be analogous to the no-fault insurance scheme, and concluded that the same extent of coverage should apply in the PIP context as under workers' compensation law. In recognizing the right of PIP insureds to medical transportation costs, ***Hunter*** expressly rejected the argument that the fact that transportation costs were, at that point, specifically included in the workers' compensation statute, but were not expressly provided for in the PIP statute, showed a legislative intent to exclude such benefits under the no-fault law.[6]

At the time that ***Hunter*** was decided in 1986, F.S. § 440.13(5) in the workers' compensation statute expressly provided that an injured employee, as part of his benefits, was entitled to the costs of transportation to and from his medical providers. Moreover, the statute stated that to the extent the employee used his private automobile

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[5] Since ***Hunter*** was decided in 1986, the policy of the courts in this State to construe the language of the PIP statute liberally in order to effect the legislative purpose of providing broad PIP coverage for Florida motorists has repeatedly and consistently been reaffirmed. *See* ***Farrer v. U.S. Fidelity & Guar. Co.***, 809 So. 2d 85 (Fla. 4th DCA 2002); ***Blish v. Atlanta Cas. Co.***, 736 So. 2d 1151 (Fla. 1999); ***United Auto. Ins. Co. v. Viles***, 726 So. 2d 320 (Fla. 3d DCA 1998); ***Farmer v. Protective Cas. Ins. Co.***, 530 So. 2d 356 (Fla. 2d DCA 1988).

[6] This argument, which was rejected in ***Hunter***, serves as the underlying basis for the ***Malu*** court's reasoning.

to obtain treatment, if evidence of the actual cost was not provided, the employee was entitled to be reimbursed at the amount allowed to state employees for official travel. However, even before the time that the workers' compensation statute was amended in 1977 to expressly provide within the statute for recovery of transportation expenses, such benefits were routinely paid to claimants and were clearly recognized as a compensable benefit.

The Mobley Decision and Its Relation to *Hunter*

In ***Mobley v. Jack & Son Plumbing***, 170 So. 2d 41 (Fla. 1964), this Court interpreted the workers' compensation scheme, prior to the addition of the statutory provision expressly allowing for recovery of transportation costs, and held that the portion of the statute requiring employers to provide such "remedial treatment, care, and attendance as the injury shall require" necessarily included travel expenses incurred by the employees in presenting themselves at the places where treatment is provided. The ***Mobley*** Court concluded that there was no doubt that the Florida legislature intended an injured employee to be given medical treatment at the expense of the employer-carrier and without expense to himself and that such a legislative intent could not be fully accomplished if an employee was required to pay his own travel expenses incurred in obtaining treatment.

In concluding that PIP insureds are entitled to be paid travel costs incurred in

obtaining medical treatment, the ***Hunter*** court relied quite heavily on ***Mobley***'s rationale and reasoned that the legislature intended that insureds be similarly recompensed for their reasonable expenses under the PIP Statute. Specifically, the court in ***Hunter*** held that the cost of transportation for medical treatment constitutes a "reasonable expense for necessary medical services" and thus is properly awarded under § 627.736(1)(a) of the PIP Statute.[7] Since ***Hunter*** was decided in 1986, the compensability of medical travel benefits under the PIP Statute has never been questioned by either the legislature or by any other court in this State–until the instant case.[8]

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[7] Other states interpret their PIP statutes similarly. See ***Plemmons v. New Jersey Automobile Full Ins. Underwriting Assoc.***, 622 A.2d 275 (N.J. Super. Ct. App. Div. 1993)(transportation expenses incurred traveling to and from prescribed medical care are compensable under the New Jersey PIP Statute as a "reasonable and necessary expenses"); ***Allstate Ins. Co. v. Smith***, 902 P.2d 1386 (Colo. 1995)(mileage costs to and from health care providers of injuries arising from auto accidents are "reasonable and necessary expenses for medical services and thus compensable under Colorado PIP Statute); ***Swantek v. Automobile Club of Michigan Ins. Group***, 325 N.W.2d 588 (Mich. App. 1982)(reasonable transportation expenses incurred for the purpose of obtaining medical treatment compensable under the Michigan no-fault act); *See also* 26 U.S.C § 213(6)(defining "medical care" under the Internal Revenue Code to include transportation costs).

[8] Since the ***Malu*** opinion was released in May of 2003, however, the Third District in virtually the identical case of ***Padilla v. Liberty Mutual***, Case Nos. 3D01-1187 and 3D01-2526, has since aligned itself with the Fourth District on the issue, has adopted the Fourth District's reasoning in ***Malu*** as its own, and has certified conflict with ***Hunter***. The Plaintiffs in ***Padilla*** have filed a Notice to Invoke Discretionary

Legislative Inaction Signifies Approval of Judicial Interpretation

In ***Malu***, the Fourth District completely ignored the fact that the Fifth District's judicial interpretation of the PIP statute in ***Hunter*** has never been responded to by the legislature in any way. Instead, the ***Malu*** court looked simply to the fact that F.S. § 627.736(1)(a) does not specifically refer to any other type of transportation cost aside from transportation by ambulance and then proceeded to invoke the *expressio unius est exclusio alterius* maxim. Plaintiff submits that the Fourth District's decision to utilize this statutory aid was patently improper because in doing so, the court disregarded a fundamental and well-settled rule of statutory interpretation, which is that "the legislature is presumed to have an awareness of the judicial construction placed upon a re-enacted statute and to have adopted this construction, absent a *clear* expression to the contrary." ***Deltona Corp. v. Kipnis***, 194 So. 2d 295 (Fla. 2d DCA 1966)(emphasis in original); *see also* ***Burdick v. State***, 594 So. 2d 267, 271 (Fla. 1992)(citing to ***Deltona*** in support of same "well settled" rule of statutory construction).

Stated differently, when a court has interpreted a statute, and the legislature does

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Jurisdiction and are awaiting an order regarding whether the Court will review the case. Additionally, Plaintiffs have filed a motion seeking to consolidate the ***Malu*** and ***Padilla*** cases, both of which present the identical issue, and are awaiting a ruling on the motion.

nothing to suggest that the interpretation does not effectuate legislative intent, it is presumed that the legislature has accepted the prior judicial construction of the statute. ***B& L Services v. Coach USA***, 791 So. 2d 1138 (Fla. 1st DCA 2001); *see also* ***Goldenberg v. Sawczak***, 791 So. 2d 1078 (Fla. 2001)(long-term legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that judicial construction); ***Collins Investment Co. v. Metropolitan Dade County***, 164 So. 2d 806 (Fla. 1964)(when a statutory provision has received a definite judicial construction, a subsequent re-enactment of the statute without any change will be held to amount to a legislative approval of the judicial construction); ***Clark v. State***, 823 So. 2d 809 (Fla. 1st DCA 2002)(where a court interprets a statute, particularly one that has been amended frequently, and the legislature does nothing to suggest that interpretation does not effectuate legislative intent, there is ordinarily no good reason to alter the interpretation).

In ***Sam's Club v. Bair***, 678 So. 2d 902 (Fla. 1st DCA 1996), the First District confronted whether, upon the statutory overhaul to the workers' compensation scheme in 1993, the deletion of the medical travel cost provision in F.S. § 440.13(5) indicated a legislative intent to disallow this category of benefits. In rejecting this interpretation, the ***Sam's Club*** court relied upon ***Mobley***, *supra*, and concluded that

it could only be presumed that the legislature omitted the costs provision in the statute with full knowledge that payment of medical travel costs would still be compensable as part of a claimant's remedial treatment, care, and attendance as held in ***Mobley***, else the legislature would have stated the contrary in the statute. ***Sam's Club*** at 904.

Likewise, in ***State v. Hall***, 641 So. 2d 403 (Fla. 1994), this Court was called upon to interpret a statutory provision concerning probation revocation and was requested by the State to adopt a new statutory interpretation. In declining to do so, this Court relied upon the fact that the statutory language contained in the relevant statutes had not been materially changed since the time that the court had first interpreted the statute almost thirty years prior. Consequently, it was concluded that the lack of a legislative response to the judicial interpretation of the statute and the failure of the legislature to make any substantive changes to the pertinent statutory language during the entire time could only mean that the legislature had no quarrel with the way that the statute had previously been interpreted. *See also* ***White v. Johnson***, 59 So. 2d 532, 533 (Fla. 1952)(legislative inaction can be taken as an indication of the legislature's acceptance of prior construction of a statute).

The ***Malu*** opinion completely ignores the fact that, although the PIP statute has been amended repeatedly over the years, the language at issue is substantially the same

as when ***Hunter*** was decided. The Florida legislature's refusal to make any substantive change to the statute indicating disagreement with ***Hunter*** shows that it approves of the Fifth District's interpretation. By failing to appreciate this, and instead applying the *expressio unius est exclusio alterius* maxim, the ***Malu*** court overlooked the legislature's approval of ***Hunter***'s interpretation of F.S. § 627.736(1)(a) to include medical travel costs and, in the process, construed F.S. § 627.736(1)(a) in a manner that is entirely inconsistent with and adverse to the legislative purpose and intent of the PIP statute, which is to provide broad coverage to insureds and to maximize, not minimize, insurance coverage. *See* note 5, *supra.*

***Expressio Unius Est Exclusio Alterius* Is Not a Rule of Law**

In ***Curtis v. U.S.***, 511 U.S. 485 (1994), Justice Souter, in a dissenting opinion, described the *expressio unius est exclusio alterius* rule as "notoriously unreliable" and commented that while it is "often a valuable servant," the maxim that the inclusion of something negatively implies the exclusion of everything else (expressio unius, etc.) is "a dangerous master to follow in the construction of statutes." ***Curtis*** at 501(quoting from ***Ford v. United States***, 273 U.S. 593 (1927)).

The Fourth District's blind adherence to the *expressio unius* canon of construction was apparently attributable to its overestimation of the value of this rule

as a tool in statutory interpretation and its failure to recognize that the maxim is simply an aid to statutory construction, which is not a rule of law, and thus can never be used to override clear and contrary evidence of legislative intent. *See* ***Neuberger v. Commissioner of Internal Revenue***, 311 U.S. 83 (1942); ***Grant v. State***, 832 So. 2d 770, 773 (Fla. 5th DCA 2002); ***Smalley Transportation Co. v. Moed's Transfer Co.***, 373 So. 2d 55, 56 (Fla. 1st DCA 1979); *see also* 2A Norman J. Singer, ***Statutes and Statutory Construction***, § 47.23, at 318 (6th ed. 2000). The *expressio unius* rule can and should be disregarded when an expanded interpretation of a statute will accomplish beneficial results or serve the purpose for which the statute was enacted or where, like here, the maxim's application would thwart the legislative intent made apparent by the entire act. ***Grant v. State***, 832 So. 2d 770, 773 (Fla. 5th DCA 2002); *see also* ***Smalley Transportation Co. v. Moed's Transfer Co.***, 373 So. 2d 55, 57 (Fla. 1st DCA 1979)(*expressio unius* maxim ought not be applied when its application, when considered in regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice).

Plaintiff respectfully submits that the ***Malu*** court's application of *expressio unius* to this case was inappropriate and that, in the face of the legislature's failure to ever respond to ***Hunter***'s interpretation of F.S. § 627.736(1)(a) to include medical

travel expenses, the legislative intent to allow such costs as a compensable benefit under the PIP statute is clear. The Fourth District's decision in ***Malu*** is legally unsound and accordingly, should be quashed.

Point III

THE DOCTRINE OF PRIMARY JURISDICTION IS NOT APPLICABLE TO THE ISSUES RAISED IN PLAINTIFFS' COMPLAINT.[9]

Within the trial court's dismissal order was a finding that the court did not have

[9] Even though the Fourth District's opinion in ***Malu*** did not specifically address this issue, Plaintiff is nonetheless raising it before this Court in an abundance of caution so as to avoid an argument down the road that the point was abandoned or waived by virtue of not being raised in this Court. It is unclear whether the Fourth District considered the second and third issues raised in Appellant's brief regarding primary jurisdiction and class certification or whether these points were deemed to be moot in light of its ruling.

"primary jurisdiction" and that the matter raised by Plaintiff was better determined by an administrative agency, specifically the Department of Insurance (hereinafter "DOI"). (R. 106). This finding was prompted by an argument raised by Security National in its motion to dismiss. Because the nature of Plaintiff's claim in this case is neither appropriate for nor subject to DOI regulation and/or intervention, the finding that the DOI has primary jurisdiction over this dispute is erroneous.

This conclusion was recently reached by the First District in the case of ***Padilla v. Liberty Mutual Ins. Co.***, 832 So. 2d 916 (Fla. 1st DCA 2002), wherein the court commented that the DOI does not have statutory authority to adjudicate what it described as, "simple contractual disputes about amounts of benefit payable under personal injury protection policies." ***Padilla*** at 920.[10]

"Rates" Means Premium Rates

Implicit in Security National's argument that the DOI should be involved in this dispute is the improper assumption that Plaintiff's request that a "mileage rate" be determined implicates the DOI's jurisdiction because the DOI is authorized to set "rates" regarding insurance pursuant to Chapter 627. This argument is wrong and

[10] The ***Padilla*** case was before the First District on appeal from an order of the DOI which declined to grant declaratory relief on a petition seeking to determine if the DOI had authority to set a mileage rate in PIP cases.

misleading because a simple review of the provisions within Chapter 627 make undeniably clear that the "rates" that the DOI is authorized to regulate are **premium** rates that insurance companies are permitted to charge to their insureds in exchange for insurance coverage. *See* F.S. § 627.041(1); F.S. § 627.0612; F.S. § 627.062; F.S. § 627.0651.

There is no question that the term "rate" used in this case is categorically different from and has absolutely nothing to do with the type of "rate" that the legislature has authorized the DOI to regulate. Plaintiff's claim does not challenge Security National's right to set insurance **premium** rates. In the event the Plaintiff prevails in her suit, Security National will not be required to alter or re-write its insurance premiums. Quite simply, the issue presented has absolutely nothing to do with the regulatory powers that the legislature has seen fit to vest in the DOI.

Because the DOI is not authorized to act any further than the bounds of its delegated authority, the lower court's implicit conclusion that the DOI has been granted regulatory power over any and all issues regarding the insurance industry is wrong. *See* ***Department of Business and Professional Regulation v. Calder Race Course***, 724 So. 2d 100 (Fla. 1st DCA 1998); ***St. Petersburg Kennel Club v. Department of Business and Professional Regulation***, 719 So. 2d 1210 (Fla. 1st

DCA 1998). In fact, this position has been expressly and repeatedly rejected in the Administrative Procedures Act, in F.S. § 120.52 and 120.536, where the legislature has in two different provisions expressed the notion that an administrative agency's authority is to be narrowly construed and can not extend beyond the specific powers and duties conferred.

It is no more appropriate for the DOI to get involved in this particular PIP claim than it would be for it to intervene in any other standard PIP lawsuit. *See* ***Padilla v. Liberty Mutual Ins. Co.***, 832 So. 2d 916, 920 (Fla. 1st DCA 2002). The issue of how much a PIP insured should be paid per mile for the use of his or her vehicle and, more specifically, whether the amount that Security National has chosen to pay to its insureds is reasonable within the meaning of F.S. § 627.736 is a **factual determination** that is appropriate for consideration by a jury just as in any other garden variety PIP lawsuit. *See* ***Derius v. Allstate Indemnity Co.***, 723 So. 2d 271 (Fla. 4th DCA 1998)(recognizing that whether a given medical service is reasonable and necessary under F.S. § 627.736 is a question of fact for the jury); ***Irwin v. Blake***, 589 So. 2d 973 (Fla. 4th DCA 1992)(question of whether medical bills are reasonable and necessary is a question for the jury to decide).

The trial court misapprehended Plaintiff's claim insofar as it erroneously

believed that the purpose of her lawsuit was to set a uniform rate for every insurance company throughout the State of Florida regarding the proper amount to be paid by insurers for medical travel mileage benefits. This is not a fair description of Plaintiff's lawsuit any more than it would be to describe a standard PIP suit seeking to compel payment of a physician's bill as seeking to determine a uniform rate for insurers throughout the State to pay for such services.

Courts Adjudicate Breach of Insurance Contract Disputes

When properly invoked, the doctrine of primary jurisdiction operates to postpone judicial consideration of a case to administrative determination of important questions involved by an agency with special competence in that area. ***Humana of Florida v. McKaughan, on behalf of natural guardians of McKaughan***, 652 So. 2d 852 (Fla. 2d DCA 1995). The purpose of the doctrine is to aid the court by deferring determination of issues that are beyond the ordinary experience of judges and juries and are within the special competence of an administrative agency, thereby providing the court with the benefit of the agency's experience and expertise in complex matters. ***Flo-Sun v. Kirk***, 783 So. 2d 1029 (Fla. 2001).

It is clear that Florida's trial courts have vast experience and competence in adjudicating PIP claims brought by insureds against motor vehicle insurers and have traditionally and routinely decided issues in such cases without the assistance or

administrative experience of the DOI. *See* ***Allstate Indemnity Co. v. De La Rosa***, 800 So. 2d 245 (Fla. 3d DCA 2001)(permitting named insured to go forward in class action claim alleging insurer violated PIP statute by failing to pay statutory interest); ***Colonial Penn Insurance Co. v. Magnetic Imaging Systems***, 694 So. 2d 852 (Fla. 3d DCA 1997)(permitting class action to go forward against insurer that allegedly made late payments of PIP benefits without adding statutory interest).

Contrary to the trial court's conclusion, this breach of insurance contract claim, in which damages are sought by an insured, belongs in the courts. *See* ***Sandpiper Homeowners Assoc. v. Lake Yale Corp.***, 667 So. 2d 921 (Fla. 5th DCA 1996)(recognizing that courts and not administrative forum is the proper place to resolve breach of contract disputes seeking damages); ***Winter Springs v. Florida Power Corp.***, 402 So. 2d 1225 (Fla. 5th DCA 1981)(stating that an administrative body is not empowered to award money damages for breach of contract). The primary jurisdiction doctrine is facially not applicable to this dispute.

Stay, Not Dismissal

Alternatively, even if the doctrine of primary jurisdiction were somehow found to be applicable to this dispute, the trial court nonetheless erred in dismissing Plaintiff's claim with prejudice. This Court, in ***Flo-Sun v. Kirk***, 783 So. 2d 1029

(Fla. 2001), recognized that the primary jurisdiction doctrine does not work to divest the circuit court of jurisdiction. Instead, the doctrine operates to postpone judicial consideration of a case and coordinates the work of the court and the agency by permitting the agency to rule first and giving the court the benefit of the agency's views. ***Id.*** at 1041 (citing to ***Hill Top Developers v. Holiday Pines Serv. Corp.***, 478 So. 2d 368 (Fla. 2d DCA 1985). To the extent the trial court based its dismissal with prejudice on the primary jurisdiction doctrine, it was clearly wrong.

Point IV

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING CLASS CERTIFICATION PREMATURELY.[11]

[11] As with Point III, Plaintiff is raising this point strictly in an abundance of caution so as to prevent any argument that she has abandoned or waived her right to

As the final ground in its dismissal order, the trial court ruled that Plaintiff's claim was inappropriate for class action treatment. In the Fourth District, Plaintiff argued that this portion of the trial court's ruling was improper because, at the motion to dismiss hearing, the court did not have sufficient information to decide whether a class action could be maintained and thus denied class certification prematurely and without hearing or considering any evidence at a class certification hearing.

In ***Cordell v. World Insurance Co.***, 355 So. 2d 479 (Fla. 1st DCA 1978) and again in ***Whigum v. Heilig-Meyers Furniture Inc.***, 682 So. 2d 643 (Fla. 1st DCA 1996), the First District reversed orders prematurely denying class certification on grounds that neither the parties nor the court were in a position to address this issue at the initial stage of the case when discovery pertaining to certain elements of class certification had yet to be employed. Both ***Cordell*** and ***Whigum*** relied heavily on this Court's opinion in ***Frankel v. City of Miami Beach***, 340 So. 2d 463 (Fla. 1976), wherein it was recognized that the appropriate way to deal with a premature motion to dismiss a class action claim is to reserve ruling on the motion to dismiss until the party seeking to represent or maintain an action as a class has had the opportunity to employ

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contest this portion of the trial court's order by virtue of not raising it in this Court. The Fourth District's opinion did not expressly mention or otherwise address this issue, though it was raised as a separate point on appeal in Appellant's brief.

sufficient discovery to ascertain the necessary information that must be plead. ***Cordell*** at 481; ***Whigum*** at 645.

In the present case, as in ***Cordell*** and ***Whigum***, the trial court did not have sufficient information to decide whether a class action could be maintained and thus abused its discretion in denying class certification prematurely. Because the First Amended Complaint sufficiently alleges a common interest to warrant treatment of the cause as a class action and because Plaintiff has sufficiently pled the requirements of Fla. R. Civ. P. 1.220, dismissal of the class action allegations was premature. Plaintiff was entitled to an opportunity to conduct discovery regarding the class allegations and thereafter to substantiate the allegations contained in her pleading with evidence at a class certification hearing. The trial court had no discretion to deny Plaintiff this opportunity.

CONCLUSION

Based on the foregoing arguments and authorities, the Fourth District's panel opinion issued on May 21, 2003 should be quashed and the ***Malu v. Security National Ins. Co.*** decision should be expressly disapproved of. In so doing, the Court should approve of and adopt the reasoning and analysis utilized by the Fifth District in ***Hunter v. Allstate Ins. Co.***

Moreover, this Court should either exercise its jurisdiction in order to rule on the third and fourth points raised in Petitioner's brief or, alternatively, remand these issues back to the Fourth District in order to expressly address and rule upon these issues, neither of which were mentioned in the May 21, 2003 opinion.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioner was served by mail this 15th day of September, 2003 on CARLOS LIDSKY, ESQUIRE and LEO BUENO, ESQUIRE , Lidsky, Vaccaro & Montes, Attorneys at Law, P.A., 145 E. 49th Street, Hialeah, Florida 33013, BETH TYLER VOGELSANG, ESQUIRE, Barranco, Kircher & Vogelsang, P.A., Museum Tower # 1400, 150 West Flagler Street, Miami, Florida 33130-1783, MARK MINTZ, ESQUIRE, Mintz, Truppman & Higer, P.A., 1700 Sans Souci Boulevard, North Miami, Florida 33181, FRANK A. ZACHERL III, ESQUIRE, COLLEEN A. HOEY, ESQUIRE and JOEY E. SCHLOSBERG, ESQUIRE, Shutts & Bowen, LLP, 1500 Miami Center, 201 South Biscayne Boulevard, Miami, Florida 33131, MARK SHAPIRO, ESQUIRE, NINA K. BROWN, ESQUIRE and JENNIFER COHEN GLASSER, ESQUIRE Akerman, Senterfitt & Eidson, P.A., Suntrust International Center, 28th Floor, 1 S.E. 3rd Avenue, Miami, Florida 33131-1714, BRIAN KNIGHT, ESQUIRE, Conroy, Simberg, Gannon, etc., 3440 Hollywood Boulevard, Second Floor, Hollywood, Florida 33021 and S. MARC HERSKOVITZ, ESQUIRE, Division of Legal Services, 612 Larson Building, Tallahassee, Florida 32399-0333.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief is in compliance with the requirements of Rule 9.210(a)(2), Fla. R. App. P.

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