IN THE SUPREME COURT OF FLORIDA

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CASE NO. SC03-1327

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SANDRA MALU,

Petitioner,

vs.

SECURITY NATIONAL
INSURANCE COMPANY,

Respondent.
_____/

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# REPLY BRIEF OF PETITIONER

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## REPLY 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.

While Security National argues throughout its Answer Brief that it was entirely within the bounds of proper appellate review for the Fourth District to affirm the trial court's order based simply on reliance upon a different legal theory from that mentioned in the trial court's order, Plaintiff adamantly disagrees and submits that the Fourth District's opinion cannot be sustained on this ground because there was never a factual basis presented so as to justify the court construing the PIP statute in the first place. *See* ***State v. Simmons***, 581 So. 2d 209, 211 (Fla. 3d DCA1991)(citing to the most basic rule of judicial decision making, which mandates that substantive issues not be decided unless it is necessary to do so in order to dispose of the interests of the actual parties to the controversy).

As argued in the Initial Brief, because Security National voluntarily paid medical

travel mileage benefits to Plaintiff and never challenged the propriety of these costs as a compensable benefit under the PIP statute, the statutory construction issue was never presented to the trial court or the Fourth District in the form of an actual case or controversy. In light of this fact, it is somewhat perplexing that Security National would argue, as it does on page 25 of its Answer Brief, that the Fourth District in ***Malu*** was correct to recognize that "the pivotal question was the proper interpretation of the PIP statute" and that the court "did nothing more than issue an opinion which conflicts with the ***Hunter*** decision on the underlying issue in this case."

Contrary to Security National's contention, the proper construction of the PIP Statute was neither an underlying nor a pivotal issue in this case. While its goes without saying that the Fourth District did issue an opinion that conflicts with ***Hunter*** by effectively forcing the "square ***Malu*** facts" into the "round ***Hunter*** holding," the fact that it did so was improper because the underlying facts and the procedural posture of ***Hunter*** and ***Malu*** are simply not the same.

Consequently, for the Fourth District to have injected an issue into the case, which simply does not and cannot exist in light of the facts presented, and in the process eliminate an entire category of routinely paid and well settled PIP benefits, was a misapplication of the "tipsy coachman" 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.

Both Security National and the amicus brief contend that there was no reason for the Fourth District, and there is no reason for this Court, to resort to any extrinsic statutory aids when construing Fla. Stat. § 627.736(1)(a) because the pertinent statutory language reveals a clear legislative intent to preclude any transportation expenses except for ambulance services. This argument is wrong for a number of important reasons.

In the first place, despite the contrary position of Security National and the amicus, this Court is not required to interpret Fla. Stat. § 627.736(1)(a) in a technical, pedantic, or unreasonable manner, nor is it permitted to apply a plain meaning analysis to the statute where to do so would lead to an unreasonable or ridiculous result, or one

which is obviously not intended by the legislature. *See* ***Weber v. Dobbins***, 616 So. 2d 959 (Fla. 1993); ***Dept. of Revenue v. Race***, 743 So. 2d 169 (Fla. 5th DCA 1999); ***United Auto. Ins. Co. v. Viles***, 726 So.2d 320 (Fla. 3d DCA 1998).

As this Court made clear in ***Blish v. Atlanta Casualty Co.***, 736 So. 2d 1151 (Fla. 1999) and again in ***United Automobile Insurance Co. v. Rodriguez***, 808 So. 2d 82 (Fla. 2002), legislative intent is the polestar that guides an inquiry under the No-Fault Law. Plaintiff respectfully submits that were this Court to interpret Fla. Stat. § 627.736(1)(a) in the manner suggested by Security National and the amicus, it would result in a statutory interpretation that was obviously not intended by the legislature.

The position urged by Security National and the amicus curiae completely ignores the fact that it has repeatedly and consistently been recognized that the statutory language contained in Fla. Stat. § 627.736(1) must be liberally construed in favor of insureds in order to effect the legislative purpose of providing broad PIP coverage to Florida motorists and, moreover, that Fla. Stat. § 627.736(1)(a) is intended to include a broad scope of medical services covered by the Florida No-Fault Act. *See* ***Blish v. Atlanta Casualty Co.***, 736 So. 2d 1151 (Fla. 1999)(recognizing that the language in the PIP Statute must be liberally construed in order to effect legislative purpose of providing broad PIP coverage); ***United Auto. Ins. Co. v. Viles***, 726

So.2d 320 (Fla. 3d DCA 1998)(stating statutory provisions under Florida's no-fault laws will be construed liberally in favor of the insured); ***Derius v. Allstate Indemnity Co.***,723 So. 2d 271 (Fla. 4th DCA 1998)(recognizing that Fla. Stat. § 627.736(1)(a) does not expressly define what constitutes a necessary medical service and that in making such a determination, the PIP statute should be construed liberally in favor of the insured); ***Farmer v. Protective Cas. Ins. Co.***, 530 So.2d 356 (Fla. 2d DCA 1988)(in determining whether an expense is a reasonable one incurred for necessary medical services, court must construe provision in the statute liberally so as to achieve broad scope of coverage); ***Palma v. State Farm Fire & Casualty***, 489 So. 2d 147 (Fla. 4th DCA 1986)(recognizing that the No-Fault Act was intended to broaden insurance coverage while at the same time reasonably limiting the amount of damages which could be claimed). In every way, the position advocated by Security National and the amicus curiae in this case ignores and runs counter to this well-settled and often-cited legislative purpose.

The flaw in the analysis presented by Security National and the amicus curiae (as well as that of the Fourth District in the ***Malu*** opinion) is that it improperly presupposes that the legislature's reference to ambulance services within Fla. Stat. § 627.736(1)(a) is made in the context of an exclusive listing of allowable reimbursable

expenses for necessary medical services. Thus, according to Security National and the amicus, the fact that ambulance services are specifically listed and other medical transportation expenses are not leads to a conclusion that the omission of the latter category of benefits was intentional.

This argument is misplaced, however, because a closer look at the pertinent statutory language establishes that there is no such listing of authorized reimbursable expenses for necessary medical services provided in the PIP Statute. Instead, ambulance services, along with hospital and nursing services, are listed in the statute as a separate form of compensable medical benefits, which are permitted **in addition to and separate from the primary category of medical services**. Medical transportation costs, such as the ones at issue in this case, on the other hand, are not a separate category of treatment or service, which would be expressly listed in the statute, but rather are authorized under the PIP statute as a "reasonable expense for medically necessary medical services." *See* ***Hunter v. Allstate Insurance Co.***, 498 So. 2d 514 (Fla. 5th DCA 1986).

As recognized in ***Derius v. Allstate Indemnity Co.***,723 So. 2d 271 (Fla. 4th DCA 1998), the legislature has made a deliberate decision under the PIP statutory scheme to neither define the precise services that constitute "necessary medical services" nor to specifically list the authorized expenses that are permitted as

"reasonable expenses" for necessary medical services. Instead, these determinations are left to the fact-finder to be made on a case-by-case basis. ***Derius*** at 274. Thus, because the legislature has not expressly provided for any authorized "reasonable expenses" for necessary medical services within the text of the PIP Statute, the fact that medical transportation expenses incurred in connection with necessary medical services are not specifically mentioned in the statute is neither illogical nor is it indicative of a legislative intent to preclude this category of benefits.

Accordingly, the ***Malu*** court's application of the *expressio unius* maxim to this case was inappropriate. Contrary to Security National's assertion in its Answer Brief, Plaintiff is not by any means suggesting that this maxim has no value as an aid in statutory construction, but rather, as pointed out in the Initial Brief, that the doctrine should not be applied blindly and should not be used, as it was in this case, to override evidence of contrary legislative intent. Because the Fourth District's application of *expressio unius est exclusio alterius* in the ***Malu*** case led to a result that is contrary to the purpose of the PIP Statute, which is to provide broad coverage to insureds and to maximize, not minimize, insurance coverage, and because it resulted in a statutory interpretation that was obviously not intended by the legislature, the decision is legally unsound and should be quashed.

Neither Security National nor the amicus brief respond to Plaintiff's point that

the Florida legislature's failure, over the years, to express any type of disagreement with ***Hunter***'s interpretation of Fla. Stat. § 627.736(1)(a) is the best indication that the legislature approves of and has adopted the judicial interpretation that travel expenses incurred in connection with necessary medical services are a compensable benefit under the PIP Statute. Instead, they assert simply that the lack of any express provision in the PIP statute for reimbursement of medical travel costs forecloses any consideration of this issue.

Plaintiff respectfully submits that the response of Security National and the amicus is incorrect as a matter of law. Were their position to have merit, then it seems clear that the decision of the First District in ***Sam's Club v. Bair***, 678 So. 2d 902 (Fla. 1st DCA 1996) would be unsound as would the holding of that case, which recognizes that even though the worker's compensation statute does not expressly provide for medical travel cost benefits, the fact that the ***Mobley*** decision judicially authorized such benefits years earlier and the legislature never saw fit to express any disagreement with that interpretation constituted a legislative adoption of the judicial interpretation.

While neither Security National nor the amicus curiae make any mention of the fact that the ***Hunter*** opinion has been in existence, and has gone unchallenged, for seventeen years, this fact is exceedingly relevant to the issue presented because it

negates the amicus' argument that ***Hunter*** was unauthorized judicial legislation. The amicus is simply wrong to argue that if the legislature wants to include medical travel costs as a compensable benefit under the PIP Statute, it can simply say so through an amendment to the statute. As argued above and in detail in the Initial Brief, the legislature has implicitly indicated its intent to permit medical travel costs as an allowable PIP benefit by virtue of its silence over the past seventeen years and its failure make any substantive change to the pertinent statutory language during the entire time to indicate that such benefits are not compensable.

Finally, irrespective of the attempts of Security National and the amicus to find fault with the ***Hunter*** court's analysis, the opinion is legally sound. Contrary to the assertion of the amicus curiae brief, ***Hunter*** is not based exclusively on the interpretation of the legislative history of the workers' compensation statute. Instead, the opinion was primarily premised on the fact that, like the workers' compensation statute, the PIP statute has always been interpreted and construed liberally in favor of the insured. ***Hunter*** at 515-516 (citing to ***Palma v. State Farm Fire & Casualty***, 489 So. 2d 147 (Fla. 4th DCA 1986)). Thus, because the legislative purpose behind the PIP Statute, like the worker's compensation statute, was to broaden, not narrow, insurance coverage, it was entirely appropriate and correct for the ***Hunter*** court to

conclude that the legislature intended to provide for the cost of transportation for medical treatment as a "reasonable expense for necessary medical service."[*]

Because the ***Hunter*** decision is based on appropriate legal reasoning and because the Florida legislature has already approved of the Fifth District's statutory interpretation through its silence over the years, this Court is respectfully urged to reject the Fourth District's decision in ***Malu*** and to adopt the reasoning of the Fifth District as expressed in ***Hunter***.

Point III

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

As Security National has apparently conceded error by the trial court on the primary jurisdiction issue, Plaintiff will not address this issue herein.

Point IV

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

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[*] While both Security National and the amicus go to great lengths in their briefs to point out all of the differences between the two no-fault schemes, these efforts are misguided. There is no dispute that there are differences between the PIP statutory scheme and the workers' compensation scheme. However, these differences do not change the fact that both statutory schemes are aimed at providing broad coverage in favor of the insured.

Security National completely ignores Plaintiff's argument that the trial court abused its discretion in denying class certification prematurely because the court did not conduct a class certification hearing during the motion to dismiss hearing and thus was not in a position to make a determination regarding the propriety of this dispute as a class action, nor could it have done so at that point in litigation. *See* ***Cordell v. World Ins. Co.***, 355 So. 2d 479 (Fla. 1st DCA 1978)(neither the parties nor the court could address the issue of class certification at the initial stage of the case when discovery pertaining to certain elements of class certification had yet to be employed); ***Whigum v. Heilig-Meyers Furniture Inc.***, 682 So. 2d 643 (Fla. 1st DCA 1996)(same).

Moreover, despite the contrary assertion of the amicus curiae, Plaintiff is not arguing that class action allegations can never be dismissed at the pleading stage. Quite clearly, that is not the law. Instead, what Plaintiff is arguing is that to the extent the Complaint sufficiently pled the prerequisites to fulfill the requirements of Fla. R. Civ. P. 1.220, it was improper for the lower court to prematurely dismiss her complaint with prejudice. ***Broin v. Phillip Morris Companies, Inc.***, 641 So. 2d 888, 890 (Fla. 3d DCA 1994)(reversing dismissal of class complaint where pleading adequately alleged four requirements of Rule 1.220).

The amicus relies quite heavily on the case of ***Dade County Police Benevolent Association v. Metropolitan Dade County***, 452 So. 2d 6 (Fla. 3d DCA 1984) to justify the dismissal of the class allegations in the case *sub judice*. Such reliance is misplaced since, unlike the conclusory allegations contained in the pleading in ***Dade County Police Benevolent Association*** wherein the plaintiff did not plead any specific facts or circumstances to show how and why the individual claim and the claims of each class member were common and typical, the allegations contained in the Complaint in this case are far more detailed and thus do not suffer from the same pleading deficiencies. Because Plaintiff's pleading was in compliance with the requirements of Fla. R. Civ. P. 1.220 and because it was sufficiently specific and precise to meet the special pleading requirements for a class action complaint, it was improper for the lower court to look beyond the four corners of the complaint at this stage rather than at a class certification hearing. *See* ***Estate of Bobinger v. The Deltona Corp.***, 563 So. 2d 739 (Fla. 2d DCA 1990).

Moreover, while steadfastly believing that it is inappropriate for any argument regarding class certification to be indulged at this point in the litigation, Plaintiff would respectfully point out that it is completely disingenuous for Security National and the amicus to suggest that a determination of the reasonable rate to be paid to each insured

is intensely factual since Security National, as part of its standard and customary business practice, pays all of its insureds a unilateral, predetermined rate of 34.5 cents per mile. The payment is neither contingent upon nor affected by the actual cost of each insured's vehicle--it is a fixed, standard rate paid to all of its insureds who seek medical travel mileage costs regardless of the type of vehicle or any other allegedly unique factual circumstance.

Security National's reliance on the out-of-state case of ***Ammons v. American Family Mutual Insurance Co.***, 897 P.2d 860 (Colo. App. 1995) in support of its position is misplaced since this case is not factually on point. In the first place, the ***Ammons*** decision was made after a class certification hearing was held--unlike the situation presented in this case. Moreover, contrary to the claim in ***Ammons***, Plaintiff herein is not seeking to judicially legislate a specific rate that will be applicable to all insurance companies in all cases. To the extent Security National has made a unilateral decision to pay its insureds, including Plaintiff, the amount of 34.5 cents per mile in medical travel costs, Plaintiff respectfully submits that she, on behalf of Security National's insureds who have been paid the same amount under their insurance contracts, have a right to argue to a jury that this amount is too low and to ask a jury to decide what a reasonable rate is under the PIP statute.

## CONCLUSION

For the reasons argued herein as well as in the Initial Brief, 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 (with due regard to the concession of error as to Point III), 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 Reply Brief of Petitioner was served by mail this 12th day of November, 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.

_____
Diane H. Tutt