IN THE SUPREME COURT OF FLORIDA

Case No. SC03-1432

Third DCA Case No. 3D01-1187

LAZARO PADILLA and ELOY and IRMA RIVERO,

Petitioners,

vs.

LIBERTY MUTUAL INSURANCE COMPANY and
URBAN INSURANCE COMPANY OF PENNSYLVANIA,

Respondents.

ANSWER BRIEF OF RESPONDENT
LIBERTY MUTUAL INSURANCE COMPANY

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I. STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

In Padilla v. Liberty Mutual Ins. Co., 2003 WL 21697054 (Fla. 3d DCA July 23, 2003), the Third District Court of Appeal, citing the Fourth District Court of Appeal decision of Malu v. Security National Ins. Co., 848 So. 2d 373 (Fla. 4th DCA 2003) dismissed a putative class action complaint filed by Plaintiff, Lazaro Padilla ("Padilla"). The complaint alleged that the sum of 32.5 cents per mile paid by Liberty Mutual Insurance Company ("Liberty Mutual") to injured persons as a mileage reimbursement benefit under Liberty Mutual Personal Injury Protection ("PIP") insurance polices was insufficient.[1] Padilla argued that a greater reimbursement amount should be paid and that the sum should be determined by the courts. Padilla sought class certification of his complaint.

The Third District affirmed dismissal of the complaint because, like the Forth District in Malu, it determined that the PIP statute does not provide for the recovery of transportation costs incurred by a policyholder while obtaining medical benefits that are not specifically enumerated in the statute.

In adopting the reasoning set forth in Malu, the Third District certified conflict with the Fifth District Court of Appeal decision of Hunter v. Allstate Ins. Co., 498 So.

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[1] Mileage reimburements were paid for transportation to and from heath care providers.

2d 514, 515 (Fla. 5th DCA 1986). In Hunter, the Fifth District, comparing the PIP statute to an old workers' compensation statute, found that transportation costs were payable under the PIP statute.

Respondent, Liberty Mutual, urges this Court to adopt the reasoning of the Fourth District's opinion in Malu and determine that, other than ambulance expenses, which are specifically referred to in the PIP statute, transportation costs incurred by a policyholder while obtaining medical treatment are not reimbursable under the PIP statute.

B. Statement of the Facts

This appeal arises because the trial court dismissed Padilla's claim[2] that a jury should establish a uniform mileage reimbursement rate for transportation costs incurred by policyholders while obtaining medical benefits under the PIP statute.[3] R1. 100 (Order). In accordance with the prevailing law at the time, Liberty Mutual reimbursed the mileage portion of a PIP claim at 32.5 cents per mile, (R1. 1 (Complaint at ¶ 9)) under the authority of Hunter ("The cost of transportation for medical treatment

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[2] A similar class action complaint was filed by Eloy and Irma Rivero against Urban Insurance Company of Pennsylvania. The cases were consolidated on appeal and in this Court.

[3] Citations to the record in the Padilla underlying case are referred to as "R1".

constitutes a 'reasonable expense for necessary medical service,' thus properly awarded under section 627.736(1)(a).").[4]

In his class representation complaint, Padilla alleged that he was injured in a motor vehicle accident in May 2000. R1.1 (Complaint at 1). Padilla claims that as a result, he received medical treatment for his injuries. Id. Padilla stated that in order to travel to receive the medical treatment, Padilla used a private passenger automobile. Id. Finally, Padilla claimed that as a result, he incurred transportation costs. Id. at 2.

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[4]Case law clearly provides that it is the plaintiff's burden to prove the reasonableness and necessity of a PIP medical benefit claim. Derius v. Allstate Indemnity Co., 723 So. 2d 271, 272 (Fla. 4th DCA 1998) ("There is nothing in the PIP statute suggesting a legislative intent to alter the normal dynamics of a lawsuit by placing the burden on the defendant in a PIP case to prove that a proposed charge was unreasonable or that a given service was not necessary."). Thus, it was Liberty Mutual's position throughout the litigation that it was entitled to set a reasonable rate of reimbursement for mileage. If an insured, such as Padilla, was not satisfied with the reimbursement, he had the right to attempt to prove that the reimbursement was not reasonable or necessary. As set forth in Derius, the determination of whether a medical benefit claim is reasonable or necessary is a question of fact to be determined by a fact finder on a case by case basis. Id. at 274. Thus, each claim by a plaintiff that a reimbursement was necessary, but not paid, or that the reimbursement was not reasonable, involves an evaluation of the facts specific to that medical claim. See e.g., R1. 18-56 (Motion to Dismiss Complaint at 15). Of course, if an insured prevails, the insured is entitled to recover attorneys' fees expended in pursuing the PIP benefit.

Given the fact-intensive nature of this claim, this action is not appropriate for class treatment, as the trial court found. Padilla simply will never be able to meet the typicality or commonality requirements. Therefore, it was not premature for the Court to find this action inappropriate as a class. The Third District did not reach this issue, as it decided the case on the threshold issue of entitlement.

Padilla never stated the amount of the actual costs incurred or that the costs incurred exceeded the 32.5 cent per mile reimbursement rate paid by Liberty Mutual. Id. at 2.

Padilla's complaint is a three count class action complaint. Id. at 1 – 8. Counts I and II are class action claims for declaratory relief and breach of contract. Id. at 2 – 6. In these counts, Padilla sought a determination that Liberty Mutual breached its insurance contract by reimbursing transportation costs at 32.5 cents per mile rather than a higher rate. Padilla asserted that the rate of reimbursement should not be determined by Liberty Mutual, but should be determined by a jury during the course of class action litigation. Id. at 4 – 7.[5] Count III is an individual claim by Padilla alleging that Liberty Mutual has not paid Padilla's medical expenses or other benefits under the PIP statute. Id. at 7.

Liberty Mutual moved to dismiss the class action complaint because[6]:

> 1. Under Florida law, claims that attack the reasonableness of a PIP medical benefit must be proven by the insured, are fact specific and will therefore vary depending upon the facts and circumstances of each

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[5] Padilla defined the putative class as, "all persons covered by a private passenger motor vehicle insurance policy issued by LIBERTY MUTUAL in the State of Florida [who] used their automobiles to attend medical treatment and who received only 32.5 cents per mile from Liberty Mutual as a cost of transportation." R1.1 (Complaint at 2).

[6] There were several other grounds upon which Liberty Mutual moved to dismiss the complaint. These are fully set forth in Liberty's Motion to Dismiss found in the record at R1. 18 – 56.

particular claim. Thus, as a matter of law, a claim challenging the reasonableness of a medical reimbursement will always be unsuitable for class resolution because individual factual issues will always predominate over class issues and there can be no commonality or typicality among claims. R1. 18 - 56 (Motion to Dismiss at 14 – 18).

2. There are no set of facts that plaintiff can show that will cause a jury or any other fact finder to determine that the rate of 32.5 cents per mile is unreasonable as to the putative class defined by Padilla. Accordingly, the rate of 32.5 cents per mile is reasonable as a matter of law and no class claim can be maintained. R.1 18 - 56 (Motion to Dismiss at 4 – 5).[7]

3. Padilla's putative class includes only those insureds seeking mileage reimbursements. But, a mileage reimbursement cannot exist alone, and will always be part and parcel of a claim for medical benefits. If an insured participates in the class, but also seeks review of the reasonableness or necessity of medical treatment of the claim associated with the mileage reimbursement, that insured may be forever precluded from seeking judicial review of the medical portion of the claim. This is so because Florida law does not permit claims arising from a single transaction to be split apart. R1. 18 - 56 (Motion to Dismiss at 19 – 21).

On April 6, 2001, the trial court dismissed Padilla's complaint without prejudice.[8] An appeal to the Third District followed. R1. 98-99.

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[7] Under Hunter and Derius, If Padilla alleged that his costs exceeded 32.5 cents per mile, and he did not, the appropriate forum to determine his claim would be county court. There, pursuant to Derius, 723 So. 2d at 274 – 275, Padilla would have to prove not only that his costs exceeded the 32.5 cent mileage reimbursement paid by Liberty Mutual, but that the particular cost incurred was reasonable.

[8] The Order provided, "For the reasons more fully expressed in Defendant's Motion to Dismiss this action is inappropriate as a class action . . ." The trial court also dismissed the complaint declining to assert jurisdiction over this matter based upon the doctrine of primary jurisdiction. The issue of primary jurisdiction is no longer at issue in this case and therefore is not addressed herein.

On July 23, 2003, the Third District affirmed the dismissal of the complaint on the authority of Malu, and certified conflict with the Fifth District Court of Appeal's decision in Hunter. R1. 59-63.

II. SUMMARY OF THE ARGUMENT

I. The Third District, in affirming the trial court's order of dismissal, properly followed the Fourth District's sound reasoning in Malu and certified a conflict with Hunter. Based upon the unambiguous language of the PIP statute, the statute does not provide for reimbursement of transportation expenses -- only ambulance expenses. By specifically including transportation by ambulance in the statute, the legislature's intent is clear that no other types of transportation are reimbursable. Accordingly, this Court should find that other than ambulance expenses, no other transportation costs incurred by a policyholder in relation to medical treatment are reimbursable under the PIP statute.

II. The Third District correctly applied the "Tipsy Coachman" doctrine in affirming the trial court's order. In accordance with the "Tipsy Coachman" doctrine, an appellate court can, and should, affirm a trial court even where the trial court's decision reaches the right result, but for the wrong reasons so long as there is any basis which would support the judgment in the record. The record in this case supports the affirmance. The Third District's reasoning was based solely on statutory

construction and not on evidentiary issues. Therefore, the factual record of the lower court is immaterial. In this case, the Third District's legal theory for affirmance is supported by the statutory interpretation of Fla. Stat. § 627.736(1)(a), a statute relied upon by all parties below. Moreover, the exact issue underlying the Third District's opinion was fully briefed by the parties before the Third District. As such, it was entirely proper for the Third District to affirm the trial court's order based on its interpretation of the PIP statute.

III. ARGUMENT

I. THIS COURT SHOULD AFFIRM THE HOLDING OF MALU AND OVERRULE HUNTER TO THE EXTENT IT CONFLICTS WITH MALU

A. The PIP Statute

Section 627.736, Florida Statutes provides in part:

> (1) Required benefits. – Every insurance policy complying with the security requirements of s. 627.733 shall provide personal injury protection to the named insured . . . 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 medically necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and medically necessary ambulance, hospital, and nursing services. Such benefits shall also include necessary remedial treatment and services recognized and permitted under the law 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; however, this sentence does not affect the determination of what other services or procedures are medically necessary.

B. Malu v. Security National Insurance Company

On May 21, 2003, the Fourth District Court of Appeal issued its opinion in Malu. The facts of Malu are virtually identical to the facts in this case. In Malu, appellant, Sandra Malu received medical treatment for injuries sustained in an automobile accident. Malu used her own car to travel to receive medical treatment, and as a result, incurred travel expenses. As part of the PIP benefit paid, Malu received 34.5 cents reimbursement for her travel expenses. Nevertheless, Malu sued her automobile insurer and asserted class action claims. Malu alleged that the amount of 34.5 cents was insufficient to compensate her for the cost of driving her car to obtain medical treatment.[9]

The trial court, following Hunter, which held that "[t]he cost of transportation for medical treatment constituted a 'reasonable expense for necessary medical service'", assumed that private transportation to and from medical treatment was a PIP benefit. Nevertheless, the trial court dismissed Malu's class action complaint for

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[9] In the instant action, Padilla never alleged that the sum paid by Liberty Mutual was insufficient to compensate him for his actual costs. He simply alleged that the reimbursement amount should have been more, and should be determined by a jury.

failure to state a cause of action on three separate grounds. See Order dated January 7, 2002, attached hereto as Exhibit A at 2 - 3.[10]

The Fourth District affirmed the dismissal of Malu's complaint for failure to state a cause of action. However, it did so for reasons other than those set forth in the trial court's order. Instead of assuming that Hunter applied, which requires the reimbursement of transportation expenses as a part of a PIP claim for medical benefits, the Fourth District found conflict with Hunter and held that the PIP statute does not include the transportation expenses claimed by Malu.[11]

There is only one instance where the PIP statute specifically provides that transportation expenses are recoverable by an insured as a PIP benefit. Section 627.736 (1)(a) states that PIP benefits are payable at the amount of "eighty percent of all reasonable expenses for . . . medically necessary ambulance . . . services." Fla. Stat. § 627.736 (1)(a) (2002). There is no other mention of reimbursement for

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[10] The trial court found: (1) the reimbursement amount of 34.5 cents is reasonable as a matter of law and therefore a class action could not be maintained; (2) the trial court does not have primary jurisdiction; and (3) plaintiff's claim is inappropriate for class action treatment under Rule 1.220, Fla.R.Civ.P., because adjudication as a class action would require the trial court to consider the individual facts surrounding the PIP claims of thousands of Security National policyholders, as well as the defenses of the insurer to each of those claims.

[11] In Malu, the Fourth District noted that the trial court was bound to follow Hunter as the only authority on point. Malu at 1.

transportation costs anywhere else in the PIP statute. As a result, based upon a basic tenet of statutory construction,[12] the Fourth District reasoned, that if the legislature specifically included PIP benefits for transportation by ambulance but chose not to mention any other type of transportation, the legislature intended that only ambulance transportation be payable as a PIP benefit, and not other modes of transportation, such as transportation to and from a medical visit by private vehicle.[13]

The Fourth District supported its reasoning by looking to § 766.31(1)(a) which outlines sums allowable when it is determined by an administrative law judge that an infant has sustained a birth-related neurological injury. Section 766.31(1)(a) provides:

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[12] "Our reasoning is based on the fact that the legislature specifically included 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. 1966)("Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another.")." Malu at 2.

[13] Moreover, the language of the PIP statute is clear and unambiguous. The only transportation benefit included is a benefit for ambulance transportation. Without an ambiguity, it is improper to construe a statute to provide meaning outside of the clear words of that statute. See e.g., Rollins v. Pizzarelli, 761 So. 2d 294, 297 (Fla. 2000). Additionally, when engaging in statutory interpretation, courts must choose the interpretation of a statute that renders the provisions meaningful and not superfluous. But, to interpret the PIP statute to include reimbursement for all transportation costs, no matter what type, would render the portion of the statute that specifically mentions ambulance costs superfluous. Under the rules of statutory construction, this is simply not permitted. Johnson v. Feder, 485 So. 2d 409, 411 (Fla. 1986). Thus, for these reasons too, the PIP statute should not be read to include transportation benefits by private vehicles to and from medical visits.

> Upon determining that an infant has sustained a birth-related neurological injury . . . the administrative law judge shall make an award providing compensation for the following items relative to such an injury:
>
> (a) Actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, family residential or custodial care, professional residential, and custodial care and service, for medically necessary drugs, special equipment, and facilities, <u>and for related travel.</u> . . .

Emphasis supplied. The Fourth District stated, "[o]ur conclusion is supported by the fact that when the legislature has intended to provide for auto transportation expenses to obtain medical treatment, it has specifically made such expenses payable."

The Fourth District's reasoning is sound. If the legislature wanted the expenses associated with transportation to and from medical visits covered under the PIP statute, it would have been simple for the legislature to have so provided. Additional support is found in other sections of the PIP statute, where reimbursements for items such as MRIs, ultrasounds, nerve conduction testing and other benefits are specifically delineated. <u>See</u> <u>e.g.</u>, Fla. Stat. § 627.736 (5) (2002). Accordingly, this Court should find that, other than ambulance expenses, which are specifically referred to in the PIP statute, transportation costs incurred by a policyholder while obtaining medical treatment are not reimbursable under the PIP statute.

C. <u>Hunter v. Allstate Ins. Co.</u>

This Court should decline to follow the Fifth District Court of Appeal decision of Hunter v. Allstate Ins. Co., 498 So. 2d 514 (Fla. 5th DCA 1986). In Hunter, the Fifth District was asked to answer the question, "[i]n personal injury protection (PIP) claims, is the cost of transportation incurred in connection with reasonable and necessary medical treatment a reimbursable medical benefit under section 627.736(1)(a)?" Id. at 514. The Fifth District compared the PIP statute to the workers' compensation statute. In so doing it found, inter alia, that it has been the policy of the courts in Florida to construe no-fault statutes, such as the workers' compensation statute, to require no out-of-pocket payments by an insured. The court therefore followed the 1964 decision in a workers' compensation case, and allowed the cost of transportation arising from a medical visit to be reimbursed under the PIP statute. Id. at 516. Hunter, and the decision that it is based on --Mobley v. Jack & Son Plumbing, 170 So. 2d 41 (Fla. 1964) -- are distinguishable.

First, although the workers' compensation statute may not allow for an injured worker to incur any out-of-pocket expenses, the face of the PIP statute does not compel that same conclusion, even though the PIP statute is also considered a no-fault statute. The PIP statute is clear that it will only reimburse "[e]ighty percent of all reasonable expenses for medically necessary . . . services." Fla. Stat. § 627.736(1)(a). Thus, under the best of circumstances, under PIP, an insured is required to pay twenty

percent of the costs of services rendered.[14] Thus, the argument that the injured insured should bear no cost is simply inapplicable.

Second, although it may have been appropriate for the Fifth District to rely on the workers' compensation statute in effect at the time that Hunter was decided in 1986, it is not appropriate to do so today. When Hunter was decided, the workers' compensation statute specifically provided for payment of the "reasonable actual cost of transportation to and from the doctor's office, hospital, or other place of treatment . . ." Fla. Stat. § 440.13.5 (1985).[15] Today, that provision is not included in the amended workers' compensation statute.

Third, the factual predicate of Mobley is distinguishable from the instant matter. In Mobley, the Florida Supreme Court determined that because the legislature intended that an injured employee be given medical treatment at the expense of the employer-carrier and without expense to himself, it would not be in accord with the statute to

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[14] Palma v. State Farm Fire & Casualty Co., 489 So. 2d 147, 149 (Fla. 4th DCA 1986), cited by the Fifth Circuit, does not mandate a different result. In Palma, the Fourth District stated that because it is the policy of the courts to interpret a no-fault statute broadly, thermographic medical treatments would be considered a medically necessary service under the PIP statute. Palma does not stand for the proposition that no cost should be incurred by a PIP insured because it is a no-fault statute.

[15] In Hunter, the insured argued that the workers' compensation law is analogous to no-fault insurance and accordingly, the same extent of coverage should apply. Hunter, 498 So. 2d at 515.

require a worker to pay his own travel expenses incurred in obtaining medical treatment. Mobley v. Jack & Son Plumbing, 170 So. 2d at 47. There is, however, one critical difference between Mobley and the instant case. In Mobley, it appears that the workers' compensation statute that was in effect at the time did not make mention of reimbursements for **any** transportation expenses. Id. at 46 – 47. Thus, the Court in Mobley could construe the statute to require payment of transportation expenses without having to address the issue of why the legislature chose to include one type of transportation expense and not others. That factual predicate is simply not present in the instant case. The PIP statute at issue, unlike the workers' compensation statute in place at the time Mobley was decided, specifically addresses ambulance expenses. It is silent as to all other transportation reimbursements. Thus, with regard to the PIP statute, it makes no logical sense to imply that the legislature intended to include all transportation expenses, when it chose only to reference one transportation expense.

II. THE THIRD DISTRICT PROPERLY APPLIED THE TIPSY COACHMAN DOCTRINE IN AFFIRMING THE TRIAL COURT'S ORDER OF DISMISSAL

Petitioners contend that the Third District Court of Appeal misapplied the "Tipsy Coachman" doctrine[16] when it affirmed the trial court's ruling dismissing the

[16] The "Tipsy Coachman" doctrine allows an appellate court to affirm a trial court that "'reaches the right result, but for the wrong reasons' so long as 'there is any basis

complaint. According to Petitioners, the record in this case does not support the Third District's rationale for affirmance. Petitioners' position is not supported by the governing law or the circumstances of this case.

It is well established that an appellate court is generally obliged to affirm a decision of a trial court if the decision is correct under any applicable theory of law. See, e.g., Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979); Firestone v. Firestone, 263 So. 2d 223 (Fla. 1972) ("[T]he findings of the lower court are not necessarily binding and controlling on appeal, and if these findings are grounded on an erroneous theory, the judgment may yet be affirmed where appellate review discloses other theories to support it."); Swanson v. Gulf West Intern. Corp., 429 So. 2d 817 (Fla. 2d DCA 1983) ("Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence *or an alternative theory* supports it.") (emphasis added). Indeed, the trial court's ruling is presumed valid, and the appellant has the burden of proving otherwise. Cohen v. Mohawk, Inc., 137 So. 2d 222 (Fla. 1962) ("It should be kept in mind that the judgment of the trial court reached the district court clothed with a presumption in favor of its validity. . . . Accordingly, if upon the pleadings and evidence before the

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which would support the judgment in the record.'" Robertson v. State, 828 So. 2d 901 (Fla. 2002) (internal citations omitted).

trial court, there was *any* theory or principle of law which would support the trial court's judgment . . . the district court was obliged to affirm that judgment.") (emphasis in original). Thus, in accordance with the "Tipsy Coachman" doctrine, an appellate court can, and should, affirm a trial court's ruling where, as here, the appellate court finds the trial court reached the right result for the wrong reason. The Third District correctly applied this principle in affirming the trial court's ruling in this case.

Petitioners' concern that the record does not support the Third District's opinion is misplaced. In this regard, Petitioners argue that because Liberty Mutual did not argue to the trial court that Petitioners were not entitled to travel reimbursement in the first place, the appellate court was precluded from addressing this issue in its opinion. The cases to which Petitioners cite do not support Appellants' position. Rather, the cases simply indicate that an appellate court's ruling must be supported by the record.[17]

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[17] The primary case upon which Appellants rely in this section of their Brief is the *dissent* in Delissio v. Delissio, 821 So. 2d 350 (Fla. 5th DCA 2002). Given that Appellants rely on the dissent, such citation should be disregarded. In addition, the dissent in Delissio is wholly distinguishable from the instant case. In Delissio, in contrast to the instant case, the theory upon which the appellate court relied in reaching its decision was a theory never advanced by the parties to the trial court *or* the appellate court. In the instant case, the parties fully briefed before the Third District the issue of whether Fla. Stat. § 627.736(1)(a) provides reimbursement for travel

In this case, the Third District's opinion was based strictly on statutory interpretation and did not implicate factual issues. Specifically, the Third District, citing to Malu, held that Fla. Stat. § 627.736(1)(a) does not provide for reimbursement of automobile transportation expenses. See Padilla v. Liberty Mutual Insurance Co., 2003 WL 21697054 (Fla. 3d DCA July 23, 2003).[18] The opinion, therefore, did not turn on factual determinations or evidentiary issues, particularly given that the order in question pertained to a motion to dismiss in which facts are not in dispute. In rendering its opinion, the Third District relied solely on an interpretation of Fla. Stat. § 627.736(1)(a). There is no dispute in the record that Fla. Stat. § 627.736(1)(a) governs this case. In fact, both parties cite to this statute throughout the pleadings and briefs in this case. Moreover, the record is replete with citations to Hunter v. Allstate

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expenses as a PIP benefit. See n.3 infra. Thus, this case is markedly different than the circumstances described in the Delissio dissent where the dissenting judge was concerned that 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." Delissio, 821 So. 2d at 355 (dissent).

[18] Liberty Mutual, by way of its Notice of Supplemental Authority, relied on the Fourth District's ruling in Malu. In fact, as per the Third District's order, Liberty Mutual filed a memorandum with the Third District explaining why the Court should follow the well-reasoned Malu opinion rather than Hunter. Thus, Liberty Mutual did, in fact, argue before the Third District that Personal Injury Protection ("PIP") benefits do not include transportation costs incurred by a policyholder while obtaining medical benefits otherwise reimbursable under the PIP statute.

Insurance Co., 498 So. 2d 514 (Fla. 5th DCA 1986) which interprets Fla. § 627.736(1)(a) so as to allow for reimbursement of travel costs. Both the Fourth District in Malu and the Third District in Padilla disagreed with the Hunter court's interpretation of the statute, thereby certifying a conflict with the Fifth District. This issue was fully briefed before the Third District in this case. Thus, the record, by including cites to both Fla. Stat. § 627.736(1)(a) and Hunter, does, in fact, support the Third District's opinion.[19]

Finally, Appellants argue, in a conclusory manner and without citing to a single case, that Liberty Mutual somehow lacks standing to contest whether Appellants were entitled to reimbursement of travel expenses because Liberty Mutual actually reimbursed its insureds these expenses. This argument is baseless. At the time Liberty Mutual made those payments, the law in Florida in this regard was Hunter which interpreted Fla. Stat. § 627.736(1)(a) to include reimbursement for travel expenses. For Liberty Mutual to disregard Hunter would have been for Liberty Mutual

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[19] Importantly, none of these cases requires that the appellate court's reason for affirming a trial court's ruling must be a reason presented by the parties in the trial court. To the contrary, in Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002), the Florida Supreme Court recognized that although generally if a claim is not raised in the trial court it cannot be considered on appeal, the exception to this generality is the Tipsy Coachman rule. Id. Thus, even though this argument (as to the statutory entitlement to reimbursement) was not presented in the trial court, the appellate court is not precluded from addressing this issue, as it did.

to ignore the governing law. Thus, Liberty Mutual, by reimbursing its insureds for travel expenses, acted in accordance with the law and certainly should not be penalized for doing so. As such, this Court should reject Petitioners' argument.

Based on the foregoing, this Court should affirm the Third District's opinion.

IV. CONCLUSION

Based on the foregoing, this Court should follow Malu, not Hunter, and determine that other than ambulance expenses, which are specifically referred to in the PIP statute, transportation costs incurred by a policyholder while obtaining medical treatment are not reimbursable under the PIP statute.

Respectfully submitted,

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CERTIFICATE OF TYPE STYLE AND SIZE

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