IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,426

SYLVESTER McKINNIE,

Petitioner,

vs.

PROGRESSIVE AMERICAN INSURANCE COMPANY,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

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BRIEF OF RESPONDENT ON THE MERITS

I.

STATEMENT OF THE CASE AND FACTS

Respondent would add to the procedural chronology set forth by Petitioner that in reversing the trial court the Fourth District Court of Appeal joined the First, Second, Third and Fifth District Courts of Appeal, making it a unanimous determination of every district court of appeal in the State of Florida. These decisions will be discussed in the argument section of this brief.

While it is not directly relevant to the question certified in these proceedings, Petitioner asserts that his position in the trial court was that the insured motorist was a "potential joint tortfeasor". The record before the trial court establishes Petitioner's acknowledgement that the insured motorist was a joint tortfeasor, not a potential joint tortfeasor. In the Motion for Summary Judgment filed by Sylvester McKinnie, the following statement is found: "The plaintiff was injured in an automobile accident which occurred on May 22, 1981, which was

caused by the negligence of two joint tortfeasors, one of whom was uninsured." (R. 45) This same position was put forth in the Unilateral Pre-Trial Stipulation (R. 39-42) and the Motion to Sever filed by McKinnie (R. 31-32).

II.

QUESTION CERTIFIED

> WHERE TWO TORTFEASORS ARE JOINTLY AND SEVERALLY LIABLE FOR DAMAGES CAUSED TO A THIRD PERSON IN AN AUTOMOBILE ACCIDENT, ALTHOUGH ONE TORTFEASOR IS UNINSURED, IF THE OTHER TORTFEASOR HAS LIABILITY INSURANCE WITH POLICY LIMITS EQUAL TO, OR GREATER THAN, THOSE CONTAINED IN UNINSURED MOTORIST COVERAGE POSSESSED BY THE INJURED THIRD PERSON, CAN THE INJURED THIRD PERSON RECOVER UNDER HIS OWN UNINSURED MOTORIST POLICY?

III.

SUMMARY OF ARGUMENT

Under the express terms of Section 627.727(1), Florida Statutes (1981), uninsured motorist coverage pursuant to the statute shall not duplicate the benefits available to an injured insured from the owner or operator of the uninsured motor vehicle or any other person jointly or severally liable together with such owner or operator for the accident. These words need no interpretation. Under the clear wording of the statute, an injured person cannot recover under his own uninsured motorist policy where that person is involved in an accident caused by joint tortfeasors, one of whom is insured and one of whom is uninsured. This has been the unanimous decision of every district court of appeal of Florida which has considered the question. Not one of these courts found the pertinent statutory

language unclear.

IV.

ARGUMENT

WHERE TWO TORTFEASORS ARE JOINTLY AND SEVERALLY LIABLE FOR DAMAGES CAUSED TO A THIRD PERSON IN AN AUTOMOBILE ACCIDENT, ALTHOUGH ONE TORTFEASOR IS UNINSURED, IF THE OTHER TORTFEASOR HAS LIABILITY INSURANCE WITH POLICY LIMITS EQUAL TO, OR GREATER THAN, THOSE CONTAINED IN UNINSURED MOTORIST COVERAGE POSSESSED BY THE INJURED THIRD PERSON, THE INJURED THIRD PERSON CANNOT RECOVER UNDER HIS OWN UNINSURED MOTORIST POLICY.

Petitioner does not cite the unbroken line of decisions of every Florida district court of appeal which have determined the injured party cannot recover under his uninsured motorist policy where involved in an accident with joint tortfeasors, one of whom is uninsured and the other of whom is insured with liability insurance policy limits equal to or greater than those contained in the uninsured motorist coverage. The first case specifically directed to this issue is Travelers Insurance Company v. Wilson, 371 So.2d 145 (Fla. 3d DCA 1979), cert. den., 385 So.2d 762 (Fla. 1980). The uninsured motorist insurer brought a declaratory action seeking determination that it was not liable for uninsured motorist coverage in a situation where joint tortfeasors were allegedly involved in an accident, one insured and the other uninsured. The liability insurance of the insured tortfeasor was equal to the uninsured motorist coverage carried by the injured party. On the specific issue which is presently before of this Court, the District of Court of Appeal stated:

"We think that it is clear that the purpose of the legislature was to provide for broad

> coverage. . .but also carefully to exclude any duplication of benefits. Therefore, if the defendant recovers from [the insured tortfeasor]. . .he cannot recover under the uninsured motorist provision of his policy." Travelers Insurance Company v. Wilson, supra at page 148.

This same result was again reached by the Third District Court of Appeal in Behrmann v. Industrial Fire & Casualty Insurance Company,[1] 374 So.2d 568 (Fla. 3d DCA 1979). The First District Court of Appeal reached the same decision in United States Fidelity and Guaranty Company v. Timon,[2] 379 So.2d 113 (Fla. 1st DCA 1979).

In Timon, the insurance carrier appealed from a summary judgment determining that the carrier would be liable, depending on the extent of injuries, for up to $10,000 of uninsured motorist benefits provided by its policy even if its insured should collect the liability limits of $10,000 covering an automobile operated by a tortfeasor involved in a collision with the insured's vehicle. The summary judgment was based upon a theory that a third vehicle driven by a hit-and-run tortfeasor contributed to the insured's loss and that since the phantom tortfeasor's vehicle was uninsured the injured party's uninsured motorist benefits should compensate because of the unavailability of an insured recovery from the phantom tortfeasor.

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[1] The Behrmann decision was cited in a citation per curiam affirmance. Espinosa v. Lumbermens Mutual Casualty Company, 390 So.2d 1230 (Fla. 3d DCA 1980).

[2] The Timon decision was cited in a citation per curiam affirmance. Williams v. State Farm Mutual Auto Insurance Company, 412 So.2d 44 (Fla. 3d DCA 1982).

On appeal, it was determined that the availability of liability coverage by a tortfeasor in the same amount as the uninsured motorist coverage precluded access to the uninsured motorist benefits of the injured party's policy. The court reasons that the availability of one joint tortfeasor's liability insurance benefits in the same amount as the available uninsured motorist benefits satisfies the purpose for which uninsured motorist benefits were provided by law. This determination is notwithstanding uninsured motorist benefits would be available to claimants were the phantom the only tortfeasor and notwithstanding the insured's recovery would be greater were the phantom not a phantom but rather an insured tortfeasor brought jointly to court with the insured tortfeasor.

The determinations in Wilson, Behrmann and Timon were followed by the Fifth District Court of Appeal in Scharfschwerdt v. Allstate Insurance Company, 430 So.2d 578 (Fla. 5th DCA 1983).[3]

The same determination was reached in a slightly different factual context by the Second District Court of Appeal in Craft v. Government Employees Insurance Company, 432 So.2d 1343 (Fla. 2d DCA 1983), pet. rev. den., 440 So.2d 351 (Fla. 1983). By final summary judgment, the trial court determined that GEICO had no liability to its insured under an uninsured motorist provision of his automobile insurance policy for personal injuries sus-

[3] Cited in citation per curiam affirmance, Rook v. Allstate Insurance Company, 436 So.2d 196 (Fla. 2d DCA 1983).

tained when a train on which the insured was riding collided with an uninsured truck. The injured party brought an action against his employer, Seaboard Coast Line Railroad Company. This suit was settled for $150,000. GEICO took the position that it was not liable to its insured even though it provided $45,000 uninsured motorist coverage under a policy provision which provided that any amount payable shall be reduced by all sums paid on account of the bodily injury received by the owner or operator of the uninsured automobile and any other person jointly or severally liable with the owner or operator for bodily injury.

GEICO's insured argued that the policy provision was contrary to the public policy of Florida expressed in Section 627.727(1), Florida Statutes (1975), the predecessor to the present statute, which provided in pertinent part:

> "The coverage provided under this section shall be excess over but shall not duplicate the benefits available to an insured under any workmen's compensation law, disability benefits law, or any similar law; under any automobile liability or automobile medical expense coverages; or from the owner or operator of the uninsured motor vehicle or any other person or organization jointly or severally liable together with such owner or operator for the accident." (Emphasis supplied.)

Citing Wilson, Behrmann and Timon and quoting from Timon, the Second District Court of Appeal announced the rule in Florida to be that when an insured is injured in an accident involving two joint tortfeasors, one of whom has liability insurance coverage equal to or greater than the insured's UM coverage and the other of whom is uninsured or underinsured, the insured is not entitled to collect benefits under his UM coverage. Quoted from

the Timon decision is the statement that the availability of one joint tortfeasor's liability insurance benefits in the same amount as claimant's uninsured motorist benefits satisfies the purpose for which uninsured motorist benefits were provided by law and contract. The court went on to determine that notwithstanding the insured's claim against the solvent tortfeasor was not paid by an automobile liability insurer, the court saw no reason why this factual distinction should change the result in the case before it.

This unbroken line of cases now include the decisions of the "sister courts" of the Fourth District Court of Appeal and the instant case which was followed by that court in a decision issued on the same day. State Farm Mutual Insurance Company v. Bayles, 459 So.2d 387 (Fla. 4th DCA 1984).

Most recently, in an opinion issued December 18, 1984, the Third District Court of Appeal followed all of the decisions cited above as well as the recently issued McKinnie decision in Bradley v. Government Employees Insurance Company, 460 So.2d 981 (Fla. 3d DCA 1984).

Can it be that every district court of appeal in the State of Florida has incorrectly precluded coverage under the circumstances of the question certified to this Court? The answer is simply that the intent of the statute set forth in the express provisions of Section 627.727(1) unquestionably precludes coverage under the facts which are here involved. The applicable statute provides that uninsured motorist coverage shall not duplicate benefits available from any person jointly or severally

liable with the owner of the uninsured vehicle. This expression is clear, it needs no interpretation. Duplicate means to repeat.[4]

Here, the injured party had uninsured motorist coverage in the same amount as the liability coverage of one joint tortfeasor. In order to be payable under the statute, uninsured motorist coverage would have to be over and above but not a duplication or repeat of the benefits available to the insured from either of the joint tortfeasors.

As pointed out in the Timon case, the availability of liability benefits in the same amount as uninsured motorist benefits satisfies the purpose for which uninsured motorist benefits were provided by law, that is to protect persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles.

Mr. McKinnie was "protected" from the owner or operator of an uninsured motor vehicle because there was available to him coverage from the liability insurance of a joint tortfeasor. This, as pointed out in the Timon case, satisfies the purpose of the uninsured motorist statute.

Whether or not Mr. McKinnie would have been "better off" if he had been involved in an accident where joint tortfeasors were both insured is no more relevant to the public policy underlying the statute than how much better off Mr. McKinnie would have been had he been involved in an accident with ten tortfeasors who had

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[4] Black's Law Dictionary (5th Edition 1979).

unlimited amounts of liability insurance available, or one tortfeasor with a $10,000,000 liability policy.[5]

It is not, as Petitioner contends, a punishment to the insured to have only $10,000 in liability coverage available to him whereas had the uninsured tortfeasor obtained liability coverage equal to Petitioner's uninsured motorist coverage the Petitioner would have had $20,000 coverage available to him. This interpretation cannot be encompassed within either the wording of the statute as it now exists or the wording of the predecessor statute.

It is not sufficient to argue that the overwhelming majority of jurisdictions allow uninsured motorist recovery under the facts contained in the certified question without a detailed examination of the particular statutes and policies under which these cases were decided. Every case cited by Petitioner as the "majority rule" were decided under the particular state law or particular policy provisions applicable. For example, see, Tholen v. Carney, 555 F.2d 479 (5th Cir. 1977). Contrary to Petitioner's argument, there is substantial reason set forth

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[5] The contrary view is expressed by the dissenting judges in Behrmann v. Industrial Fire and Casualty Insurance Company, supra and the instant case. If this beneficent view were intended by the statute, it would not have specifically prohibited the duplication by the uninsured motorist coverage of the liability coverage of the joint tortfeasor. The "duplication" prohibition of the statute also limits the generally stated purpose of UM coverage set forth in Dewberry v. Auto-Owners Insurance Company, 363 So.2d 1077 (Fla. 1978), that is to allow the insured the same recovery which would have been available to him had the uninsured tortfeasor been insured to the same extent as the insured himself. Dewberry is clearly limited to situations which involve one but not two joint tortfeasors.

expressly in Florida's statute and the cases under the Florida statute which requires that the certified question be answered in the negative.

Petitioner engages in a tortured construction of the present version of Section 627.727(1) as amended in 1979 to come to the conclusion that the "liability coverage of a joint tortfeasor is simply not included in the statute." A simple reading of the statute indicates that what shall not be "duplicated" are "the benefits available to an insured from any person jointly or severally liable together with the uninsured owner or operator for the accident. To argue that the present statute provides for uninsured motorist coverage without regard to whether an insured tortfeasor was also involved in the accident simply ignores the plain language of the statute.[6]

Both the plain language of the statute and the public policy underlying the uninsured motorist statute completely support the determination of the District Court of Appeal in the instant case as well as the determinations of every other district court of appeal on the same subject. If the legislature wants to change the statute to provide coverage under the extant facts, it is at liberty to do so. "However, that is a legislative matter and the legislature has provided otherwise." Sheedy v. Vista Properties, Inc., 410 So.2d 561, 563 (Fla. 4th DCA

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[6] The provision in the present statute which prohibits setoffs against uninsured motorist coverage except for the liability coverage of an underinsured tortfeasor does not affect the result reached by the District Court of Appeal in the instant case.

1982). The certified question should be answered in the negative.

Petitioner also argues that the arbitrators, as requested by the insured, and not the trial judge should determine whether the insured motorist was a joint tortfeasor. This argument is deficient for either of two reasons. In several pleadings in the trial court, Mr. McKinnie announced that he was injured by joint tortfeasors, one of whom was insured and one of whom was uninsured. (R. 31-32, 39-42, 45) The position cannot be abandoned during the appellate phase of the litigation.

If, as Petitioner argues, the arbitrators were to determine that the insured motorist did not contribute to the accident and was not a joint tortfeasor this would be a determination of coverage. Arbitrators do not determine questions of coverage. Cruger v. Allstate Insurance Co., 162 So.2d 690 (Fla. 3d DCA 1964), see also Kenilworth Insurance Co. v. Drake, 396 So.2d 836 (Fla. 2d DCA 1981). As in the Cruger case, the true question being litigated was whether an insured motorist contributed to the accident and, accordingly, whether the subject accident comes within the terms of the uninsured motorist provisions of the policy. This is a question of coverage, not liability, and one for a court and not for arbitration. State Farm Fire & Casualty Co. v. Glass, 421 So.2d 759 (Fla. 4th DCA 1982).

The decision cited by Petitioner is inapposite. In Ebens v. State Farm Mutual Automobile Insurance Co., 278 So.2d 674 (Fla. 3d DCA 1973) the court held only that issues of liability of an admittedly uninsured motorist were for the arbitrators.

Here, the question of whether the driver of the insured vehicle was a joint tortfeasor will determine coverage--an issue for the trial court.

V.

CONCLUSION

For the reasons and under the authorities set forth above, it is respectfully requested that the question certified to this Court be answered in the negative.

VI.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Marcia E. Levine, Attorney At Law, Fazio, Dawson & DiSalvo, P.O. Box 14519, Ft. Lauderdale, Florida 33302, this 7th day of March, 1985.

Respectfully submitted,

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