IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 66,426
(4th DCA Case #82-2235 & 83-60

SYLVESTER MCKINNIE,)

Petitioner,)

vs.)

PROGRESSIVE AMERICAN INS. CO.,)

Respondent.)

)

PETITIONER'S INITIAL BRIEF ON THE MERITS

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QUESTION PRESENTED

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?

PREFACE

This brief is submitted by SYLVESTER MCKINNEY, Plaintiff below, seeking review of an order of the District Court of Appeal, Fourth District, which certified the following question as one of great public interest:

> 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?

Reference to the Record On Appeal will be by "R.". Any emphasis appearing in this brief is that of the writer unless otherwise indicated.

STATEMENT OF THE CASE

Petitioner filed a complaint to compel arbitration, alleging that he was injured as a result of the negligence of an uninsured motorist, that he was entitled to proceed with arbitration of his UM claim pursuant to the terms of the insurance contract, and that Respondent breached the insurance contract by refusing to arbitrate (R.21-22). Respondent answered by denying these allegations (R.23). Petitioner moved for summary judgment on his action to compel arbitration (R.45-49), which was granted (R.57,60). The trial court also entered judgment taxing attorneys fees and costs in favor of Petitioner (R.68). Respondent timely appealed from each of those judgments (R.62).

STATEMENT OF THE FACTS

The essential facts of this case are included in the statement of the case. The only additional facts which are relevant is that at the summary judgment hearing, Respondent argued that Petitioner was not entitled to proceed with arbitration of his UM claim because there was an insured motorist involved in the accident who was a joint tortfeasor, and that the liability coverage of the insured motorist was equal to

Petioner's UM coverage, $10,000.00 (R.2-18). Petitioner agreed, for the purpose of the summary judgment hearing, that the insured motorist was a "potential joint tortfeasor" (R.19).

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 THIRD PERSON, THE INJURED THIRD PERSON CAN RECOVER UNDER HIS OWN UNINSURED MOTORIST POLICY.

The District Court based its holding on the following language of Section 627.727(1), Florida Statutes (1981):

> The coverage provided under this section shall be over and above, but shall not duplicate the benefits available to an injured insured . . . 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.

Implicit in the District Court's holding is that (1) the emphasized language refers to any automobile liability coverage of one who is an independent joint tortfeasor and (2) the liability coverage of the joint tortfeasor must be set off against the insured's UM coverage. Petitioner would respectfully submit that each of these premises is incorrect.

Sec. 627.727(1) F.S. (1981) initially provides:

> No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state . . . unless coverage is provided therein . . . for the protection of persons

> insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom.

There can be no doubt that pursuant to this provision of the statute, a person who is injured by the negligence of an uninsured motorist would be entitled to recover under his own UM policy, regardless of whether an insured tortfeasor was also involved in the accident.

The statute then goes on to list three categories of potential recovery which UM coverage shall not duplicate; the three categories are separated by semicolons. In order to properly analyze the 1981 statute, we must first look at the statute as it existed prior to the 1979 amendment:

> 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, personal injury protection benefits, disability benefits law, or similar law; under any automobile liability, or automobile 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.

The first category of enumerated benefits which UM coverage shall not duplicate includes benefits for medical expenses and lost wages which are separate and distinct from

automobile liability coverages, i.e., benefits available under workmen's compensation laws, personal injury protection laws, disability benefits laws and similar laws.

The second category of potential recovery which UM coverage shall not duplicate are coverages available in connection with automobile liability policies, i.e., automobile liability coverage and automobile medical payments coverage.

Clearly the third category of potential recovery which UM coverage shall not duplicate does not refer to the automobile liability coverage of anyone, since the second category of benefits encompasses "any automobile liability . . . coverages." Rather, the third category refers to recovery from the individual owner or operator of the uninsured vehicle or anyone vicariously liable for their negligence.

If the legislature had intended a fourth category, i.e., recovery from a joint tortfeasor who is totally independent from the uninsured owner and operator, it would have used another semicolon to create the fourth category:

> 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.

By writing the statute in this manner the legislature could have, if it so desired, created one category pertaining to recovery

from the individual owner or operator of the uninsured vehicle, and another category pertaining to recovery from some other person or organization totally separate and distinct from the owner or operator of the uninsured vehicle who is jointly liable, i.e., an independent joint tortfeasor.

However, that is not how the statute is written. The legislature is presumed to know the rules of grammar, and in construing the statute the court must consider the manner in which the statute is punctuated. Florida State Racing Commission v. Bourquardez, 42 So.2d 87 (Fla. 1949). A semicolon is used to separate independent clauses in a compound sentence.[1] The legislature has, by the use of semicolons, created three independent categories of potential recovery which UM coverage shall not duplicate, and benefits available from an independent tortfeasor is not among them. To say that the third category refers to potential recovery from the liability insurance carrier of an independent joint tortfeasor requires a gross distortion of the English language.

As previously indicated, Sec. 627.727(1) F.S. was amended in 1979. The changes in the 1979 statute are as follows:

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[1] Webster's New Collegiate Dictionary, (1973) p.1052.

> The coverage provided under this section shall be ~~excess~~ over and above, but shall not duplicate the benefits available to an insured under, any ~~workmen's~~ worker's compensation law, personal injury protection benefits, disability law, or 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. Only the underinsured motorist's automobile liability insurance shall be set off against underinsured motorist coverage. (changes in statute noted)

The 1979 amendment to the statute does not change the three independent categories of potential recovery which UM coverage shall not duplicate, except that automobile liability insurance was deleted. Additionally, the provision was added that no benefits can be set off against UM coverage except the liability coverage of an underinsured motorist. These changes in the statute apparently resulted from the numerous appellate decisions which not only set off the underinsured tortfeasor's liability coverage from UM coverage, but also improperly set off other available benefits enumerated in the statute, such as PIP benefits and worker's compensation benefits.[2]

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[2] See, e.g., Fidelity & Casualty Company of New York v. Moreno, 350 So.2d 38 (Fla. 3rd DCA 1977); Evans v. Florida Farm Bureau Casualty Insurance Company, 355 So.2d 149 (Fla. 1st DCA 1978); Florida Farm Bureau Casualty Company v. Andrews, 369 So.2d 346 (Fla 4th DCA 1978) cert den'd. 381 So.2d 766 (Fla. 1980).

At any rate, the third category in the amended statute remains identical to the third category in the prior statute, and its construction must also remain the same. Nowhere does the prior statute or the 1979 statute refer to the liability insurance coverage of a joint tortfeasor as something which UM coverage shall not duplicate, or as something which must be set off against UM coverage. As previously indicated, the 1979 statute provides for no set offs against UM coverage except for the liability coverage of an underinsured tortfeasor. The liability coverage of a joint tortfeasor is simply not included in the statute. Consequently, since the UM statute provides for UM recovery by an insured who is "legally entitled to recover damages from owner or operators of uninsured motor vehicles because of bodily injury," without regard to whether an insured tortfeasor was also involved in the accident, the question certified by the District Court must be answered in the affirmative.

The result obtained by answering the certified question in the affirmative is consistent with the purpose of UM coverage, i.e., 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 v. Auto-Owners Insurance Company, 363 So.2d 1077 (Fla. 1978).

the insurance contract by refusing to arbitrate (R.21-22). Respondent answered by denying these allegations (R.23). Petitioner then moved for summary judgment, which was granted.[6] (R.45-49,57).

The District Court, in reversing the summary judgment, ruled that on remand, "the trial court should proceed with a determination as to the responsibility and rights of the respective parties". Thus, the District Court ruled that the trial court, not the arbitrators, should determine whether the insured motorist was a joint tortfeasor. This ruling was improper, not only because the instant case was not a "declaratory action", where the trial court would be empowered to determine all issues in dispute between the parties, but also because, as a matter of public policy, insurance carriers should not be allowed to avoid arbitration, as required by the insurance contract, every time an accident involving an uninsured tortfeasor also involves an insured motorist.

UM arbitration clauses universally provide that the insured's right to recover damages and the amount of damages shall be determined by arbitration. If the insured's right

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[6]At the summary judgment hearing Petitioner assumed the existence of a "potential joint tortfeasor" for purposes of the hearing (R.19).

to recover damages depends upon the existence, vel non, of negligence on the part of an insured motorist, the arbitrators must determine that issue. That issue is no different than the question of whether there was, in fact, a "phantom vehicle" which caused the accident, or whether there was negligence on the part of an identified uninsured motorist which caused the accident. The insured cannot be forced into costly, time consuming circuit court litigation when both parties to the contract have bargained for arbitration. Certainly the insured cannot be required, as a condition precedent to arbitration, to bring a tort action against the insured motorist, merely because the insurance carrier claims that the insured motorist is a joint tortfeasor. Furthermore, it is doubtful, based upon traditional principles of estoppel by judgment, that a jury verdict in favor of the insured motorist in a tort action would be binding on the UM carrier in arbitration, since the UM carrier would not be a party to the tort action.

The question of whether the insured motorist was a joint tortfeasor is not a question of coverage. Respondent does not now dispute the fact that it issued a policy of insurance to Petitioner, providing uninsured motorist coverage in the amount of $10,000.00, and that said policy of insurance was in full force and effect at all times material hereto. The question of

the insured motorist's liability is a question of fact bearing upon the insured's right to recover damages, and thus must be determined by arbitration. Ebens v. State Farm Mutual Automobile Insurance Company, 278 So.2d 674 (Fla. 3d DCA 1973).

CONCLUSION

In view of the foregoing, the question certified by the District Court should be answered in the affirmative, the decision of the District Court should be quashed, the judgments entered by the trial court should be reinstated, and Petitioner's motion for attorney's fees should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was served by mail this 8th day of February, 1985, upon: JOE N. UNGER, ESQUIRE, 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130, RON KOPPLOW, ESQUIRE, 300 Courthouse Square Building, 200 Souhteast Sixth Street, Fort Lauderdale, Florida 33301.

By: Marcia E. Levine
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