

FILED

S'D J. WHITE

MAR 28 1985

IN THE SUPREME COURT
STATE OF FLORIDA

CLERK, SUPREME COURT

CASE NO. 66,426

By _____
Chief Deputy Clerk

(4th DCA Case # 82-2235 & 83-60)

SYLVESTER McKINNIE,

Petitioner,

vs.

PROGRESSIVE AMERICAN INS. CO.,

Respondent.

PETITIONER'S REPLY BRIEF

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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.

Petitioner does not dispute the fact that the appellate courts of this state have repeatedly held that an injured insured is not entitled to recover UM benefits when the automobile accident was caused by the combined negligence of an uninsured tortfeasor and an insured tortfeasor whose liability coverage is equal to the injured person's UM coverage. Unfortunately, none of those courts carefully analyzed the "crucial language"¹ of the UM statutes or the manner in which they were written.

Of course under the pre-1979 UM statutes, UM coverage could not duplicate the available automobile liability coverage of anybody, inasmuch as the statute specifically listed "any automobile liability . . . coverages" as something which UM coverage could not duplicate. Thus, since this Court, in Dewberry v. Auto-Owners Insurance Company, 363 So2d 1077

¹"; 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."

(Fla. 1978), set off the automobile liability coverage of an underinsured tortfeasor against the amount of UM coverage available to an injured insured, the appellate courts began setting off the automobile liability coverage of independent joint tortfeasors. United States Fidelity & Guaranty Co. v. Timon, 379 So2d 113 (Fla. 1st DCA 1979); Behrmann v. Industrial Fire & Casualty Insurance Company, 374 So2d 568 (Fla. 3d DCA 1979); Travelers Insurance Company v. Wilson, 371 So2d 145 (Fla. 3d DCA 1979) cert. den'd. 385 So2d 762 (Fla. 1980).

The legislature, in enacting the pre-1979 UM statutes, could not have possibly intended the "crucial language" of the statute to refer to the automobile liability coverage of an independent joint tortfeasor, inasmuch as the preceding category of potential recovery enumerated in the statute includes "any automobile liability . . . coverages". Certainly the legislature would not have defined three separate categories of potential recovery which UM coverage shall not duplicate, if it intended for the third category (crucial language) to be included in the second category ("any automobile liability . . . coverages"). The clear intent of the legislature in using the crucial language was to preclude UM coverage from duplicating any recovery obtained from the individual owner or operator of the uninsured motor vehicle, or from someone vicariously liable for their negligence, such as an employer. To interpret the crucial

language of the statute to include the automobile liability coverage of an independent joint tortfeasor would be tantamount to a judicial re-writing of the statute.

The cases cited by Respondent which deal with the UM statute as amended in 1979² merely cite the older cases as authority for denying UM benefits under the circumstances stated above, without any attempt to ascertain legislative intent by the manner in which the statute is written. Just as the appellate courts of this state were wrong in setting off PIP benefits, disability benefits and workmen's compensation benefits from the amount of UM coverage available to an injured insured,³ they are equally incorrect in setting off the liability coverage of a joint tortfeasor. The statute simply does not provide for such a set off. As previously illustrated, the 1979 - 1983 statutes have deleted automobile liability coverage as something which UM

²Schartschwerdt v. Allstate Insurance Company, 430 So2d 578 (Fla. 5th DCA 1983); State Farm Mutual Automobile Insurance Company v. Bayles, 459 So2d 387 (Fla. 4th DCA 1984); Bradley v. Government Employees Insurance Company, 460 So2d 981 (Fla. 3d DCA 1984).

³See, e.g., Fidelity & Casualty Company of New York v. Moreno, 350 So2d 38 (Fla. 3d DCA 1977); Evans v. Florida Farm Bureau Casualty Ins. Co., 355 So2d 149 (Fla. 1st DCA 1978); Masters v. Lester, 366 So2d 471 (Fla. 1st DCA 1979); Florida Farm Bureau Casualty Company v. Andrews, 369 So2d 346 (Fla. 4th DCA 1978) cert. den'd. 381 So2d 766 (Fla. 1980); Carter v. Government Employees Insurance Company, 377 So2d 242 (Fla. 1st DCA 1979); Waters v. State Farm Mutual Automobile Ins. Company, 393 So2d 1203 (Fla. 2d DCA 1981); Kenilworth Ins. Co. v. Drake, 396 So2d 836 (Fla. 2d DCA 1981).

coverage shall not duplicate, and the only "set off" allowed under those statutes is the liability coverage of an underinsured motorist.

Both the public policy of this state, as illustrated in the dissenting opinions in the instant case and in the Behrmann case, and the language and punctuation of the UM statute itself, require that the certified question be answered in the affirmative.

The question of who decides whether the insured motorist is, in fact, a joint tortfeasor, is no more a coverage issue than the question of whether the uninsured motorist is, in fact, a tortfeasor. Petitioner would refer to his initial brief for a complete discussion of this argument.

At the hearing on Petitioner's motion for summary judgment, Petitioner agreed, for the purpose of the hearing, that the insured motorist was a "potential joint tortfeasor". (R.19). Petitioner admits that in prior motions he referred to the insured motorist as a joint tortfeasor. That is because Petitioner felt confident, as he still does, that he is entitled to maintain his UM claim regardless of whether the insured motorist was, in fact, a joint tortfeasor. Nonetheless, that issue (whether the insured motorist was a joint tortfeasor) was never raised by the pleadings, either in the Complaint to Compel

Arbitration or as an affirmative defense in the Answer (R. 21-23). If this Court answers the certified question in the negative, the question of liability on the part of the insured motorist should be determined by arbitration and not by circuit court litigation.

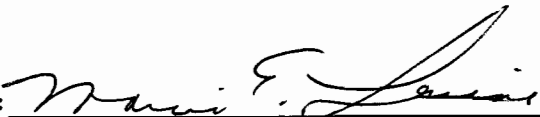
CONCLUSION

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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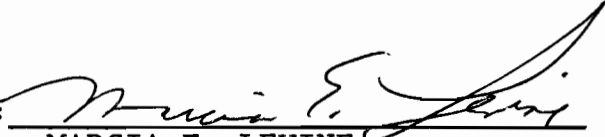
Counsel for Respondent

By: 
MARCIA E. LEVINE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was served by mail this 26th day of March, 1985, upon: JOE N. UNGER, ESQUIRE, 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130, RON KOPFLOW, ESQUIRE, 300 Courthouse Square Building, 200 Southeast Sixth Street, Fort Lauderdale, Florida 33301.

By:


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