O/a 6-4-86

IN THE SUPREME COURT OF FLORIDA

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.,

Petitioner,

vs. CASE NO. 67,591

RYDER TRUCK RENTAL, INC., a Florida corporation, d/b/a RYDER TRUCK RENTALS, S & M CYRPESS CO., INC., a Florida corporation, and STANLEY EARL EIB,

Respondents.

_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

DISCRETIONARY PROCEEDINGS FROM THE THIRD DISTRICT COURT OF APPEAL

CASE NO. 84-2053

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INTRODUCTION

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., Plaintiff in the trial court, Appellant before the Third District Court of Appeal and Petitioner herein, will be referred to as "Blue Cross."

RYDER TRUCK RENTAL, INC., S & M Cypress Co., Inc., and Stanley Earl Eib, Defendants in the trial court, Appellees in the Third District Court of Appeal, and Respondents herein, will be collectively referred to as "Ryder."

"R" refers to the record on appeal.

STATEMENT OF THE CASE AND FACTS

On October 31, 1980, Ada Montesino was covered under a group health insurance contract issued by Blue Cross. On that date, Mrs. Montesino was a passenger in an automobile involved in a collision with a vehicle owned by Ryder. Mrs. Montesino sustained personal injuries necessitating hospitalization, and incurred hospital and physician's bills. Blue Cross paid those bills in the amount of $9,970.87. (R. 1-3).

Mrs. Montesino filed suit against Ryder in the Dade County Circuit Court, alleging that Ryder's negligence caused her injuries. Ryder defended against reimbursing Mrs. Montesino for medical expenses previously paid by Blue Cross, using as its defense Section 627.7372, Florida Statutes (commonly referred to as the "collateral source statute"), and thus paid no such amounts to Mrs. Montesino. (R-25). The remaining issues between Mrs. Montesino and Ryder were ultimately settled by Ryder making certain monetary payments to Mrs. Montesino.

On November 15, 1983 Blue Cross filed suit against Ryder and others seeking return of the $9,970.87 which Blue Cross had been forced to pay on behalf of Mrs. Montesino as a result of the negligent acts of Ryder. Ryder filed a Motion to Dismiss the Complaint, alleging that the complaint failed to state a cause of action upon either common law or contractual indemnity for the purported reason that Blue Cross had no such right against Ryder under Florida law. (R-9). The trial court entered an Order of Dismissal with prejudice, stating:

> "That because the insured [Mrs. Montesino] is barred from recovery under the provisions of the Motor Vehicle No-Fault Law, the insurer [Blue Cross] is similiarly barred from any subrogation or indemnification rights by reason thereof. Ergo, there exists no cause of action for indemnity. (R-122).

Motions for Rehearing were filed before the trial court, and denied. Timely appeal was taken to the Florida Third District Court of Appeal, and the issues were briefed and argued. In its opinion filed July 30, 1985 (Blue Cross and Blue Shield of Florida, Inc. vs Ryder Truck Rental Co., Inc., et al., 472 So. 2d 1375 (Fla. 3rd DCA 1985)), the Third District Court determined that:

> "The trial court correctly noted that the 'collateral source rule,' Section 627.7372 of the Motor Vehicle and Casualty Insurance Contracts Chapter, Florida Statutes (1983), precludes an insurer such as Blue Cross from instituting a claim for subrogation against the tortfeasor for sums paid by the insurer to the insured, . . . "

and further

> ". . . we are unable to conclude that the collateral source rule operates equally as a bar to the insurer's claims for both subrogation and indemnity. Rather, based upon the nature of the right of indemnity, we find that Blue Cross possesses no claim for indemnity against Ryder, not because of the collateral source rule, but because the common law of Florida does not now and has not in the past permitted such cause of action."

As it appeared to Blue Cross that the ruling of the Third District Court was inconsistent and conflicting with the law espoused by the Supreme Court and other District Courts of Appeal, timely Petition for Discretionary Review in this court was filed. By its order entered February 25, 1986, this court accepted jurisdiction of the case.

STATEMENT OF THE ARGUMENT

I. THE LOWER COURT COMMITTED PREJUDICIAL ERROR IN DENYING BLUE CROSS' ACTION AGAINST RYDER FOR INDEMNIFICATION, WHICH ACTION WAS SEEKING REIMBURSEMENT FOR MEDICAL EXPENSE PAYMENTS ARISING OUT OF AN INJURY CAUSED BY RYDER'S NEGLIGENCE.

II. THE LOWER COURT'S USE OF THE COLLATERAL SOURCE RULE (Section 627.7372) TO DESTROY THE COMMON LAW SUBROGATION AND INDEMNIFICATION RIGHTS OF BLUE CROSS AGAINST RYDER IS UNCONSTITUTIONAL AS APPLIED TO BLUE CROSS AS SUCH ABOLISHES BLUE CROSS' RIGHTS WITHOUT SUBSTITUTING A REMEDY THEREFORE.

SUMMARY OF THE ARGUMENT

At common law and in equity, one who has been required to respond for the fault of another is entitled to reimbursement under one or more of the theories of contribution, indemnification and/or subrogation, depending upon the status of the one seeking reimbursement. It is Blue Cross' contention that, at any time it has to pay the medical bills of its subscribers which medical bills were caused as a result of the negligence of a third person, Blue Cross is entitled to recover of and from that third person. Although clearly Blue Cross would never be entitled to contribution (by definition it could never be a joint tortfeasor), it has always been entitled to either subrogation or indemnification, the historical route being subrogation.

In 1977 the Florida Legislature enacted Section 627.7372, Florida Statutes, commonly known as the "collateral source rule." Contrary to the assertion of the trial court, the Third District Court and Ryder herein, such statute did not destroy Blue Cross' common law right of subrogation against a third party tortfeasor for whose negligence Blue Cross was required to respond. Nor did the statute destroy Blue Cross' right to indemnification against the tortfeasor. Instead the statute simply precluded an injured plaintiff from double recovery, once from the tortfeasor and once from any collateral source.

Notwithstanding the fact that Blue Cross still has a right to subrogation, in the instant case Blue Cross elected to seek indemnification directly of and from Ryder, rather than seeking subrogation.

The trial court, affirmed by the Third District, ruled that Blue Cross was entitled to neither subrogation nor indemnification of and from Ryder. That ruling is erroneous, and should be reversed.

However, should this Court uphold that ruling, then this Court must of necessity hold that the collateral source rule as applied to Blue Cross in the instant case is unconstitutional. The reason for this is that prior to passage of the statute, Blue Cross clearly had the right to subrogation and to indemnification, but if the statute is held to preclude those rights, then the statute has abolished Blue Cross' rights without substituting a remedy therefore. Such creates a denial of access to the courts, which access is guaranteed by Article I, Section 21, Florida Constitution. Case law holds that the legislature is without the power to abolish such a right of access to the courts without providing a reasonable alternative, unless the legislature can show an overpowering public necessity for the abolishment of such right. The collateral source statute itself provides no reasonable alternative, and the legislature has not shown an overpowering public necessity. Thus an interpretation of the collateral source statute as precluding Blue Cross' rights to subrogation and indemnification would be unconstitutional.

ARGUMENT

I. THE LOWER COURT COMMITTED PREJUDICIAL ERROR IN DENYING BLUE CROSS' ACTION AGAINST RYDER FOR INDEMNIFICATION, WHICH ACTION WAS SEEKING REIMBURSEMENT FOR MEDICAL EXPENSE PAYMENTS ARISING OUT OF AN INJURY CAUSED BY RYDER'S NEGLIGENCE.

The trial court's dismissal of Blue Cross' complaint was with prejudice, based upon the following finding:

> ". . . that because the insured is barred from recovery under the provisions of the Motor Vehicle No-Fault Law, the insurer is simultaneously barred from any subrogation or indemnification rights by reason for indemnity."

The Third District Court of Appeal affirmed the dismissal with prejudice, although using slightly different rationale from that of the trial court. The Third District upheld the trial court's finding that the "collateral source rule (Section 627.7372, Florida Statutes)" precluded ". . . an insurer such as Blue Cross from instituting a claim for subrogation against the tortfeasor for sums paid by the insurer to the insured," but declined to deny Blue Cross' claim for indemnification as being in violation of the "collateral source rule." Instead, the Third District upheld the trial court and destroyed Blue Cross' rights by finding that:

> ". . .Blue Cross possesses no claim for indemnity against Ryder, not because of the collateral source rule, but because the common law of Florida does not now and has not in the past permitted such a cause of action [emphasis supplied]. Blue Cross and Blue Shield of Florida, Inc. vs. Ryder Truck Rental, Inc., et al., 472 So. 2d 1373, 1375 (Fla. 3d DCA 1985).

While the concept of law known as "indemnification" has been

long and tortured, it has, as have many areas of the law, evolved and changed to meet the needs of a changing society. A good explanation of the genesis of the concept of indemnfication, as well as its changing role viz a viz other legal concepts (such as in relation to contributory negligence and no-contribution rules) can be found in Wetherington, Tort Indemnity In Florida, 8 Fla. St. U. L. Rev. 383 (1980), among others. Suffice it to say the concept of indemnification has not remained static.

Historically the concept of indemnification was very broad, encompassing the general rule in equity that anyone required to pay because of the fault of another should be reimbursed by the one at fault. The historically-accepted definition of indemnity was extremly broad, and as stated by Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130 (1932), encompassed the following:

> "The idea of indemnity implies a primary or basic liability in one person, though a second person is also for some reason liable with the first, or even without the first, to a third person. Discharge of the obligation by the second person leaves him with a right to secure compensation from the one who, as between themselves, is primarily liable."

It should be noted that the above definition does not require any duty running between the indemnitor and the indemnittee. In fact, it clearly excludes that notion. It simply says that if one person settled an obligation which should have been settled by another, the person settling the obligation is left with the right to secure compensation from the other. This is a succinct statement of Blue Cross' claim

against Ryder in the trial court.

This broad interpretation of the concept of indemnification is still accepted today. As Prosser says, "the duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other." W. Prosser, The Law of Torts, Section 51, at 313 (4th ed. 1971). In fact, even the leading case in Florida and the one which all of the authorities now say has substantially changed Florida's indemnification law, contains a general definition of indemnity as:

> "a right which inures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other." Houdaille Industries Inc. vs. Edwards, 374 So. 2d 490, 492 (Fla. 1979).

Finally, in this initial discussion of the historical precedence of the concept of indemnity, it should be noted (and perhaps it should be considered a truism, although it appears to have been overlooked in some cases) that indemnification began as a means to reimburse a totally innocent party from the coffers of the "at fault" party. In fact, if the party seeking indemnification was considered himself to be a tortfeasor, or in any way at fault, the action for indemnification would not lie. It was required that the one seeking indemnification showed himself to be totally without fault. This concept changed, however, when the no-contribution rules began to be imposed by the contributory negligence rules. See Wetherington. In other words, the law evolved to create certain exceptions in the "no fault" requirements

of the indemnification concept, so that a person who was only vicariously or technically liable, or who bore only an extremely small and "passive" portion of the fault, could secure reimbursement from the one actually at fault and "actively" negligent. But such changing of the concept to benefit tortfeasors did not change the initial concept of benefiting parties totally without fault. Indemnity was still available to allow an innocent party to shift his entire loss to another. As stated by Professor Leflar:

> "Other types of the right to indemnity are commonly called quasi contractual, or arising out of a "contract implied by law.". . . The quasi contractual idea of unjust enrichment of course underlies any holding that one who has been compelled in discharging his own legal obligation to pay off a claim which in fairness and good consciousness should be paid by another can secure reimbursement from that other." Leflar, Contribution and Indemnity Between Tortfeasors, supra, at 146-47.

Thus clearly Blue Cross has a claim for indemnification against Ryder of long-standing historical antecedent. It can be considered either as a right arising from the common law, or as a right available through equity, but it is a right available under both the past and the present common law of Florida which permits such a cause of action.

It is true that today the right of indemnification is applied mostly in situations involving tortfeasors, but it is not exclusively their province. There are basically three methods for allocating loss among those responsible for paying claims of an injured party, those methods being subrogation, contribution and indemnification. The basic premise of Blue Cross in this argument is that it has been required

to pay for the negligence of Ryder and thus is entitled to be made whole. The question then is which of the three methods of allocating loss is available to Blue Cross.

Concerning subrogation, both the lower court and the Third District Court in this case held that Blue Cross was not entitled to subrogation because of the operation of the collateral source rule. That same prohibition has now been upheld by the First District Court of Appeal in the case of Blue Cross and Blue Shield of Florida, Inc. vs. Timothy L. Matthews, et al., 473 So. 2d 831 (Fla. 1st DCA 1985). As this Court is aware, Blue Cross strongly disagrees with such holding, and such case is currently before this Court as a companion to the instant case. However, assuming arguendo, that Blue Cross' common law right of subrogation has been destroyed by the collateral source statute, there must be some other remedy available to Blue Cross or the statute itself is unconstitutional.

The only two methods of allocating loss remaining are contributions and indemnification. The former is strictly a statutory remedy available to joint tortfeasors and therefore clearly does not apply here. Thus Blue Cross could not avail itself of a claim against Ryder sounding in contribution.

That brings us to the bottom line. The only remedy left for Blue Cross is an action in indemnification against Ryder. If the collateral source statute is to remain constitutional as applied to Blue Cross, then Blue Cross necessarily must have a right of indemnification against Ryder. Contrary to the holding of the Third District

Court of Appeal below, Blue Cross respectfully submits that such right does exist.

"PRE-TORT DUTY"

Both common law and equity allow a totally innocent party who discharges the obligation of another to secure compensation from that other. There is no requirement of any pre-tort duty between them, and there is no requirement of vicarious, constructive, derivative or technical liability. The cause of action exists, and Blue Cross should be allowed to take advantage of it.

Nevertheless, the Third District Court of Appeal, in denying Blue Cross' claim for indemnification, relied upon Houdaille, supra, in finding that Blue Cross had no "special relationship" with Ryder and that there was no pre-tort duty between Blue Cross and Ryder. Such reliance was in error, as this is a mistaken interpretation of Houdaille.

Houdaille was not a case involving one totally innocent party attempting to secure indemnification from a tortfeasor who was totally at fault. Instead, Houdaille involved two tortfeasors, one of whom was seeking indemnification from the other. In such a situation the law over the last century or so had built up certain exceptions to the general rule which excluded such an action, the exceptions allowing an indemnification claim if the tortfeasor seeking indemnification had been only "passively" negligent or was only "vicariously" or technically" liable, as long as the

party against whom indemnification was sought was the one who was actively negligent. All of the exceptions (which, again were historically designed to get around the no-contribution rule) eventually would bottom on the premise that there had to have been some pre-tort duty between the two parties litigating the indemnification. This rule meant that there only had to be such a pre-tort duty between tortfeasors; there is no such corresponding rule pertaining to one who is totally without fault seeking indemnification from the active tortfeasor. The opinion of the Third District Court below in this case relies upon the Wetherington article for its finding that there had to be some pre-tort duty. However, it is clear from reading Wetherington and the other authorities that the pre-tort duty is only necessary among or between tortfeasors, but nowhere is this duty imposed upon a non-tortfeasor or a totally innocent party such as Blue Cross in this case. The Third District has simply applied an exception to a case calling for the general rule and came up with an erroneous decision.

There is no necessity for a pre-tort duty to exist between Ryder and Blue Cross in order to uphold Blue Cross' indemnification claim in this case, as it appears that equity must construe such a duty to exist. Both had separate duties to Mrs. Montesino, but both duties were intertwined one with the other. At the instant of the damage to Mrs. Montesino, Ryder became primarily liable to Mrs. Montesino and Blue Cross became secondarily liable to her.

Blue Cross, in the discharge of its contractual duty, assumed the duty of Ryder in this regard. The pre-tort duty between Ryder and Blue Cross was clear and foreseeable. In this day and age of extensive automobile insurance and health insurance, Ryder can never be heard to say it was not foreseeable that its negligence would cause such a loss to Blue Cross.

"SPECIAL RELATIONSHIP"

Regarding the Third District Court's contention that there had to be a "special relationship" between the parties involved in the indemnification action, the court pulled that wording from this court's decision in Houdaille where, when talking about the concept of indemnity, this court says that:

> "It shifts the entire loss from one who, although without active negligence or fault, has been obligated to pay, because of some vicarious, constructive, derivative, or technical liability, to another who should bear the costs because it was the latter's wrongdoing for which the former is held liable. See Mims Crane Service, Inc. vs. Insley Manufacturing Corp., 226 No. 2d 836 (Fla. 2nd DCA 1969; Westinghouse Electric Corp. vs. J. C. Penney Co., 166 So. 2d 211 (Fla. 1st DCA 1964)." Houdialle, supra, page 493.

From that language the Third District Court of Appeal mistakenly concluded that there must exist a "special relationship" between the parties in the indemnification action whereby the party seeking indemnity must be either vicariously, constructively or technically liable for the wrongful acts of the party against the tortfeasor. Even if this court determines that a special relationship is required, Blue Cross submits that such a relationship exists and can be easily demonstrated.

Blue Cross had a contract of insurance with its insured, by which Blue Cross agreed to pay medical bills sustained by the insured for, among other reasons, accidents. Thus Blue Cross clearly had a contractual relationship and responsibility to its insured. In effect, Blue Cross had entered into an agreement of contractual indemnification with its insured, agreeing to pay the insured for medical expenses arising out of an accident.

However, the Blue Cross insurance policy was not the only protection available to Ada Montesino. If she were injured by the negligence of a third person, she clearly has a right for restitution against the party injuring her. In other words, she herself can seek indemnification against the tortfeasor. But being a prudent person in today's modern society, and knowing that she did not want to wait for medical treatment or for payment of medical bills while she litigated with the tortfeasor, she earlier secured health insurance through Blue Cross. In effect she was saying to Blue Cross, "You take on the duty owed to me by that person who might injure me, and you fight the battle for restitution later. I don't want any part of it".

Thus Ada Montesino was the beneficiary of duties and responsibilities flowing from two separate entities. The first was the insurance coverage from Blue Cross, and the second was Ryder's duty not to act negligently. When Ryder breached its duty, those injuries to Ada Montesino immediately caused Blue Cross to have to respond for medical expenses. Thus at the instant of the

infliction of injury, Blue Cross became vicariously responsible for Ryder's obligation to make Mrs. Montesino whole. There can be no greater "special relationship" at law.

The Third District Court cited several cases for the proposition that there had to be some type of pre-existing legal "special relationship" in order for Blue Cross to have a claim against Ryder. See, e. g., Atlantic Coast Development Corp. vs. Napolean Steel Contractors, Inc., 385 So. 2d 676 (Fla. 3d DCA 1980); American Home Assurance Co. vs. City of Opa Locka, 368 So. 2d 416 (Fla. 3d DCA 1979); Pender vs. Skillcraft Industries, Inc., 358 So. 2d 45 (Fla. 4th DCA 1978); Olin's Rent-A-Car System, Inc., vs. Royal Continental Hotels, Inc., 187 So. 2d 349 (Fla. 4th DCA); Westinghouse Electric Corp. vs. J. C. Penney Co., 166 So. 2d 211 (Fla. 1st DCA 1964); and Fincher Motor Sales, Inc. vs. Larkin, 156 so. 2d 672 (Fla. 3d DCA 1963). All of these cases did in fact involve some type of vicarious, derivative, constructive or technical liability, but it must be remembered that, for various reasons, all of the parties seeking indemnification in those cases were liable to some degree or other in tort. Again, such is not the case with Blue Cross in this instant case. There does not have to be some type of implied contractual relationship between Blue Cross and Ryder; instead, there only needs to be at most a duty between them which is implied at law, which duty clearly exists.

As an analogy, . . . assume a father and son are walking along a sidewalk, bothering no one. Assume further that another man, without provocation, walks up to the son and strikes him in the face, causing the loss of several teeth. Although there is no

pre-tort duty or "special relationship" in existence between the father and the third party who strikes the son, nevertheless it would be ludicrous to say that the father did not have a right of action against that other person for reimbursement of medical and dental bills which the father was required to pay on behalf of his son.

The bottom line is that Blue Cross has been required to pay for damages caused by the negligence of Ryder and under the common law and in equity should be entitled to indemnification to recover those sums. Blue Cross' contract requires it to stand in the stead of Ryder and immediately pay to Ada Montesino the damages caused by Ryder's negligence. Blue Cross thus becomes vicariously liable for the negligence of Ryder, and its duty to do so is clearly foreseeable by Ryder. Thus all tests necessary to allow an action in indemnification filed by one who is totally without fault (as opposed to one who is technically at fault) have been met, and Blue Cross' cause of action was erroneously and prejudically dismissed with prejudice.

II. THE LOWER COURT'S USE OF THE COLLATERAL SOURCE RULE (Section 627.7372) TO DESTROY THE COMMON LAW SUBROGATION AND INDEMNIFICATION RIGHTS OF BLUE CROSS AGAINST RYDER IS UNCONSTITUTIONAL AS APPLIED TO BLUE CROSS AS SUCH ABOLISHES BLUE CROSS' RIGHTS WITHOUT SUBSTITUTING A REMEDY THEREFORE.

The Third District Court of Appeal upheld the trial court's dismissal of Blue Cross' claims for subrogation and indemnification against Ryder. The trial court based its dismissal with prejudice on the collateral source rule. The Third District Court's affirmance is a specific ruling that the dismissal of the subrogation action below was proper.

The opinion of the Third District Court never reached the issue of whether or not the collateral source rule destroyed Blue Cross' claim for indemnification against Ryder, as the Third District Court instead held that Blue Cross never had a right of indemnification, and thus a non-existant right could not be effected by the statute. However, as set forth above, it is the position of Blue Cross that it does have a valid claim for indemnification against Ryder. If this court agrees, then all it needs to do is reverse the opinion of the Third District Court of Appeal and remand the matter for trial on the indemnification claim. If instead this court does not agree, but feels that the only remedy Blue Cross ever had at common law was subrogation, then the court's application of the collateral source statute has destroyed Blue Cross' subrogation right without substituting a remedy therefore and such destruction of a pre-existing right is unconstitutional. And finally, if instead this court feels Blue Cross had both a subrogation and an indemnification right, but that both rights are

destroyed by the collateral source statute, then once again such destruction of rights is unconstitutional as no remedy has been substituted therefore. This agreement will assume the worst-case scenario.

The law of Florida is clear concerning a denial of access to the courts guaranteed by Article I, Section 21, Florida Constitution. This Court in Kluger vs. White, 281 So. 2d 1 (Fla. 1973) stated that:

> "Where a right of access to the courts for a particular injury has been provided by . . . the common law of the state . . ., the legislature is without the power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the state to redress for injuries, unless the legislature can show an overpowering public necessity for the abolishment of such right." 281 So. 2d at 4.

As stated in the preceding argument, a common law right to indemnification has long existed, and Blue Cross is entitled to that right. Further, although not mentioned in the argument above, it is clear that a common law right to subrogation has long existed. State Farm Mutual Automobile Insurance Company vs. Robbins, 237 So. 2d 208 (Fla. 4th DCA 1970); Morgan vs. General Insurance Company of America, 181 So. 2d 175 (Fla. 1st DCA 1966); Rebozo vs. Royal Indemnity Company, 369 So. 2d 644 (Fla. 3rd DCA 1979); Atlantic Coastline Railways vs. Campbell, 139 So. 886 (Fla. 1932); Blue Cross of Florida, Inc. vs. O'Donnell, 230 So. 2d 706 (Fla. 3d DCA 1970); DeCespedes vs. Prudence Mut. Cas. Co., 193 So. 2d 224 (Fla. 3d DCA 1966), affd. 202 So. 2d 561 (Fla. 1967);

Rodriguez vs. Travellers Ins. Co., 367 So. 2d 687 (Fla. 3d DCA 1969), affd. 387 So. 2d 341 (Fla. 1980); and Eckerd vs. Government Employees Ins. Co., 334 So. 2d 119 (Fla. 3d DCA 1976).Thus Blue Cross, prior to the passage of the collateral source statute, was entitled to reimbursement from a tortfeasor under the theory of subrogation or under the theory of indemnification, or both. Thus if those rights have been abolished by the collateral source statute, then either a reasonable alternative to protect those same rights must have been provided for, or the legislature must have shown an overpowering public necessity for the abolishment of those rights. As neither occurred, then the application of the collateral source statute to destroy Blue Cross' rights is unconstitutional as a violation of Article I, Section 21, Florida Constitution.

In order to avoid a finding that the application of the statute to Blue Cross is unconstitutional, it should be remembered that the collateral source statute does not by its express terms prohibit an action by a subrogee or an indemnitee. Instead it simply prohibits a double recovery by the injured party himself. In fact, the collateral source statute in no way prohibits the injured party's action against the tortfeasor for all medical bills incurred as a result of the tortfeasor's negligence; even if the injured party has health insurance, the injured party could decline to accept benefits under insurance and instead seek compensation directly from the tortfeasor. Thus the statute precludes only a double recovery by the injured

party; it should not be utilized to preclude recovery under the theories of either subrogation or indemnifcation on the part of an insurance company who paid the injured party's medical expenses.

It is clear that nowhere in the collateral source statute (nor elsewhere in the Florida Automobile Reparations Act) did the legislature provide an alternative method by which Blue Cross could be reimbursed, if the collateral source statute precluded claims in subrogation and indemnification. Thus Section 627.7372 clearly fails the first part of the Kluger vs. White test relating to provision of a reasonable alternative.

Thus the next question is did the legislature show an overpowering public necessity for the abolishment of such rights and no alternative method of meeting such public necessity can be shown? Blue Cross thinks not. There is absolutely no evidence in this record showing any necessity much less an overpowering one for abolishing such right. Indeed, as the Fifth District Court of Appeal noted in Prince vs. American Indemnity Company, 431 So. 2d 270 (Fla. 5th DCA 1983):

> "We must admit to difficulty in understanding the economic or social purpose of the collateral source rule. In circumstances such as these, the tortfeasor's insurance carrier escapes liability, and the injured party's carrier pays. Even more incomprehensible would be the case where the health or medical policy had no connection whatever with the automobile coverage."
>
> Id., at 272.

The most important case construing the collateral source statute is Purdy vs. Gulf Breeze Enterprises, Inc., 403 So. 2d 1325 (Fla.

1981), in which this court upheld the constitutionality of Section 627.7372. Unlike the instant case, the appellant in Purdy attacked the statute on the basis that it precluded appellant's right to recover medical expenses from the tortfeasor and denied appellant's right of access to the courts. This court did not uphold the constitutionality of the collateral source statute on the basis of any "reasonable alternative" nor any overpowering public necessity," but instead found that the injured party never had any "previous right of access to the courts" once the benefits had been paid by the collateral source. Moreover, the court stated that the statute "merely prevent(s) injured plaintiffs from recovering monies which, equitably speaking, belong to their insurers. [emphasis supplied]." Id, at 1329. It is, therefore, clear that health insurers are entitled to recover monies which they have paid because of the wrongful acts of another. If 627.7372 is interpreted so as to deny Blue Cross' right to recover its payments, then the statute is unconstitutional as it is applied to Blue Cross and other similarly situated health insurance carriers.

If the logic of the Third District Court of Appeal is allowed to stand, then Blue Cross and all similarly situated health insurers are caught in a "Catch-22" situation. The right of subrogation or indemnification only arises when an insurer makes payment for the loss incurred. National Surety Corporation vs. Bimonte, 143 So. 2d 709 (Fla. 3d DCA 1962). If Blue Cross makes a payment

under its contract of insurance to its injured subscriber, then according to the logic of the Third District Court of Appeal that very act of payment destroys Blue Cross' right of action by prohibiting its right of recovery of those damages from the tortfeasor. The result, which Blue Cross submits was not intended by the legislature, is that Blue Cross and thus its policy holders are underwriting a portion of automobile liability insurance. This result, however, only occurs if Blue Cross is denied its rights to recover against the tortfeasor's insurance carrier. Certainly the legislature cannot be held to have intended such unjust and illogical results.

CONCLUSION

Thus since the legislature did not provide a reasonable alternative, and since the legislature did not show an overpowering public necessity for the abolishment of the rights, it must be that the legislature did not intend for the statute to destroy subrogation or indemnification rights of health insurers such as Blue Cross. Instead, the legislature intended only to avoid lawsuits by and among auto insurance carriers, and to prevent double recoveries by injured plaintiffs. It is contended herein that such was the legislature's true intent, and the collateral source statute should be so interpreted. Otherwise, it necessarily fails the test of constitutionality.

Lastly, a final distinction should be made. Blue Cross is not asking this court to allow it an action against its own subscriber in subrogation, as clearly any such action against its own subscriber is precluded because the subscriber has been precluded from recovering from the tortfeasor pursuant ot the collateral source statute. But subrogation is not limited to a claim against the insured; subrogation includes a claim against the tortfeasor through and in the name of the subscriber.

Unless this court authorizes continued subrogation and/or indemnification actions by the health insurance companies against the automobile accident tortfeasors and their automobile insurance companies, then the collateral source statute is unconstitutional as applied to such health insurance companies. Thus, in

order to avoid a ruling causing the statute to be unconstitutional, this court should overrule the Third District Court of Appeal with instructions that the cause be remanded to the trial court for further proceedings including trial of the indemnification action against Ryder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing Brief was mailed this 24th day of March, 1986 to: Andrew Needle, Esq., Spence, Payne, Masington, Grossman & Needle, 2950 S. W. 27th Avenue, St. 300, Miami, FL 33133; and Raymond T. Elligett, Jr., Esq., Shackleford, Farrior, Stallings & Evans, P. O. Box 3324, Tampa, Florida 33601.

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