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
CYPRESS CO., INC., a Florida
corporation, and STANLEY
EIB,

Respondents.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

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 Respondent herein, will be collectively referred to as "RYDER."

STATEMENT OF THE CASE AND FACTS

BLUE CROSS adopts by reference as fully as if set forth verbatim herein the Statement of the Case and Facts contained in its Initial Brief on the Merits previously filed herein.

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.

a. SPECIAL RELATIONSHIP.

b. COMPARATIVE NEGLIGENCE; ATTORNEY'S FEES.

c. PUBLIC POLICY.

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.

III. THERE IS AN ABSOLUTE AND COMPLETE BASIS FOR THIS COURT TO ACCEPT JURISDICTION OF THIS MATTER.

SUMMARY OF THE ARGUMENT

BLUE CROSS adopts by reference as fully as if set forth verbatim herein the Summary of the Argument contained in its Initial Brief on the Merits previously filed herein.

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

In Respondents' Answer Brief on the Merits, RYDER very seriously confuses the concepts of subrogation and of indemnification. Not only is RYDER confused, it is confused inconsistently.

RYDER'S basic premises is that BLUE CROSS has only a subrogation claim and that BLUE CROSS must "stand in the shoes" of its subscriber and that under the theory of subrogation any claim by BLUE CROSS is barred by Section 627.7372, Florida Statutes (1979). However, for the reasons set forth in the argument and briefs filed in the companion case hereto (Blue Cross and Blue Shield of Florida, Inc. Petitioner, vs. Timothy L. Matthews, et al., Respondents, Supreme Court Case No. 67,598), BLUE CROSS still has a claim for subrogation, and such claim has not been destroyed by Section 627.7372, Florida Statutes. However, the purpose of this reply brief is not to argue subrogation, but instead to reply to RYDER'S Answer Brief relating to BLUE CROSS' claim for indemnification in this presently-pending action.

It must be remembered that all claims made by BLUE CROSS against RYDER in this action were based on the theory of indemnification, rather than subrogation. The reason for that strategy decision is obvious. Several Circuit Court and Appellate Court decisions

decided prior to BLUE CROSS' filing its claim against RYDER herein appeared to hold that section 627.7372, Florida Statutes (1979), eliminated or seriously restricted subrogation claims. BLUE CROSS does not agree with those interpretations, and in fact vehemently urges this Court that its right of subrogation is still totally valid and enforceable. Nevertheless, in order to avoid the delays inherent in arguing against erroneous precedent, BLUE CROSS elected to file its claim against RYDER herein based on the theory of indemnification. Further, this is not indemnification based on contract, or even based on the current trend of tort indemnification with all of its tenuous rules and interpretations. Instead, BLUE CROSS' claim herein is simply based on the common law right of indemnification.

As stated earlier, RYDER'S Answer Brief on the Merits seriously confuses the concepts of subrogation and of indemnification. Thus this Reply Brief on the Merits will attempt to clarify that confusion and inconsistency, and in following RYDER'S arguments, will break down the argument for this Point I into the following sub-headings:

SPECIAL RELATIONSHIP

RYDER in its Answer Brief cited both Mims Crane Service vs. Insley Manufacturing Corporation, 226 So. 2d 836 (Fla. 2 DCA 1969) and Houdaille Industries vs. Edwards, 374 So. 2d. 490 (Fla. 1979) for the proposition that BLUE CROSS has no indemnification claim

against RYDER because no previously-existing special relationship existed between BLUE CROSS and RYDER. Such proposition is totally preposterous. The relationship does not have to be either contractual or found at law. In fact, Mims, talks of a general relation between the parties which is ". . . such that either in law or in equity there is an obligation on one party to indemnify the other . . . (emphasis supplied)" as being sufficient to impose a cause of action for indemnification, and this court in Houdaille specifically refrains from giving a strict definition of whatever "special relationship" is necessary. The reason for the latter is obvious. Since the cause can arise either at law or in equity, an equitable determination must be based on the facts of the individual case presented. In fact, this court at page 493 of Houdaille set forth the test for indemnity, and authorizes such an action to:

> ". . . only be applied where the liability of the person seeking indemnity is solely constructive or derivative and only against one who, because of his act, has caused such constructive liability to be imposed."

RYDER never denies the fact that it had a duty not to injure BLUE CROSS' subscriber, or upon violation of such duty, being responsible for payment of medical expenses necessitated by its negligence. However, RYDER appears to vehemently deny that any portion of that duty would pass "through the shoes" to BLUE CROSS, assuming this were a subrogation action. RYDER asserts that BLUE

CROSS only has a subrogation claim, and thus BLUE CROSS must stand in the shoes of its subscriber, but then denies that BLUE CROSS would enjoy the benefits as well as suffer the burdens of that position. If this was a subrogation claim, then clearly, RYDER'S duty to BLUE CROSS' subscriber would pass through to BLUE CROSS. That in itself would be a sufficient "special relationship" to create a right of action in BLUE CROSS, as it did historically for decades.

There are many analogies which could be made. Perhaps the clearest and most concise would be that of a "special relationship" between a father, a son and a tortfeasor who injures the son. Assume that the son is injured by a negligent driver, and the father is required to pay the son's medical bills. Clearly there is a special relationship between the father and son, but just as clearly, there is a special relationship between the tortfeasor and that tortfeasor's impact upon both the father and son. The tortfeasor has a duty not to injure the son, but if the son is injured then to reimburse the various losses of the son including payment of medical bills. However, the father also has a duty to the son, which includes the duty of support and of paying for "necessaries" which include payment of medical bills. Assuming the father pays the son's medical bills, clearly the father meets the Houdaille test for indemnity, and thus has the right to recover of and from the tortfeasor based on common law indemnification. Clearly in the case at bar BLUE CROSS is also entitled to common

law indemnification, as between BLUE CROSS and RYDER, the "whole fault" is RYDER'S, who is the one against whom indemnity is sought. Houdaille, supra, at page 493.

In its Answer Brief on the Merits, as it did before the Third District Court of Appeal, RYDER places much emphasis on the holding of Allstate Insurance Company vs. Metropolitan Dade County, 436 So. 2d. 976 (Fla. 3rd DCA 1983). However, Allstate is in no way determinative of this issue as Allstate was clearly from the beginning a subrogation case and was initially filed as a subrogation case (the insurance company claiming as a subrogee of the insured) neither of which comprise the situation here. In Allstate, the insurance company could have required its subscriber to file suit against the tortfeasor, which BLUE CROSS could not and does not propose in this case. Moreover, Allstate declined to pay until many months into an arbitration law suit, whereas here BLUE CROSS paid its subscriber immediately. Of particular interest in the Allstate decision is the Court's distinction between contractual subrogation and contractual indemnification, whereby the Court noted:

> "In equity, however, the distinction between subrogation and indemnification may blur. A court may emphasize either or both of the doctrines 'when necessary to bring about equitable adjustment of a claim founded on right and natural justice.' [citations omitted] A court recognizing equitable rights may, therefore, refer to subrogation and indemnification interchangeably."

The bottom line is that, in order to do equity, and to right an injustice, the courts may blur such artificial distinctions. It is

with this thought in mind that BLUE CROSS brings this and its companion case of Matthews to this Court.

RYDER, in discussing the "special relationship" which must exist prior to institution of an indemnification action, makes several comments to the effect that the relationship must be ". . . different from that which exists between the indemnitee and the general public," that the relationship must be ". . . foisted upon [BLUE CROSS] unknowingly," and that if BLUE CROSS assumed a liability [the obligations under the contract of insurance] to its subscriber of its " . . . own volition," then it was not entitled to indemnity. The absurdity and utter weakness of such an argument is reflected by the absence of any authorities cited by RYDER to support such a contention. There is no such authority, and those are not the requirements necessary to support an action in indemnification. In the first place, there is a relationship between BLUE CROSS and RYDER which is different from that which exists between an indemnitee and the public in general. Such relationship is created by the breach of duty which results in the injury to the subscriber on whose behalf BLUE CROSS must respond with the paymnet of medical benefits. Thus if indemnity is defined as ". . . a right which enures to one who discharges a duty owed by him (Houdaille) . . . ", then obviously no such duty could be unknowingly foisted upon one who knowingly assumes such duty. And there is simply no authority for RYDER'S third proposition.

COMPARATIVE NEGLIGENCE; ATTORNEY'S FEES

RYDER further argues that if an indemnification claim by BLUE CROSS is permitted, then RYDER would be unable to assert an affirmative defense based on comparative negligence. Again, RYDER cites no authority. RYDER would in fact have such an affirmative defense if in fact BLUE CROSS' subscriber had been partially negligent, but such partial negligence on the part of BLUE CROSS' subscriber in no way destroys BLUE CROSS' indemnification claim against RYDER. Once again we cannot be confused by RYDER'S assertions that even in an indemnification claim BLUE CROSS must stand in its subscriber's shoes. That concept exists only in subrogation, not in indemnification. In the indemnification action, BLUE CROSS is in no way negligent, and thus can maintain the action. But obviously, if the subscriber had been comparatively negligent, that matter could be raised as a defense against BLUE CROSS' claim.

RYDER also discussed the alleged unfairness of BLUE CROSS being able to claim attorney's fees in the indemnification action against RYDER. Contrary to RYDER'S assertion, BLUE CROSS has not and did not create any right to attorney's fees in an agreement (the contract of insurance) between the subcriber's employer and itself, rather such right is created by the common law. In a subrogation action BLUE CROSS does not have a claim for attorney's fees as BLUE CROSS had to "stand in the shoes" of its subscriber, and clearly the subscriber had no such right in his or her tort action. However,

when it is necessary for BLUE CROSS to sue in indemnification, the law says attorney's fees are available to a plaintiff in indemnification claims. The distinction is that in a subrogation claim, BLUE CROSS would not necessarily have to mount a separate legal action, whereas in an indemnification claim it does. Thus attorney's fees should be and are available.

PUBLIC POLICY

RYDER argues that BLUE CROSS' bringing an indemnification action necessarily doubles the amount of personal injury litigation and complicates settlements. First, the record in this case is absolutely devoid of any such evidence. Secondly, even if there was any evidence, then BLUE CROSS did not ask the legislature to cause it to have to choose this route, and BLUE CROSS would prefer that the slightly simpler system of subrogation be either upheld or reinstated. Nevertheless, RYDER'S arguments are specious even under the old concept of subrogation, for at some times it was necessary to file a separate law suit and at all times it was necessary to intervene into pending law suits. And the settlement mechanism has not (or at least should not have) changed at all, for in subrogation cases all plaintiff's lawyers had to ensure a total settlement with all parties including the health insurance carrier. That does not change under a cause of action for indemnification. Thus the burden on the trial courts and the law in general has not been increased, or if it has, then such increase has

not been because of any actions of BLUE CROSS but because of Section 627.7372 and the court's interpretation thereof. BLUE CROSS is simply attempting to protect its interests under common law and as otherwise guaranteed by the Florida and United States Constitutions.

Lastly, RYDER attempts to sway this court by making a combined insurance underwriting/legislation argument, to include some off-the-record assumptions regarding insurance rate-setting, refunds of premiums, windfalls and the legislative intent therewith. RYDER neither knows nor has conducted discovery regarding how premiums were determined for the policy in question, nor does it know and nor can it represent to this court that the contract of insurance in question, issued September 1, 1979, ever took into effect the changed 1979 statute in question. Its argument about BLUE CROSS' profit and whether or not refunds of premium would ever be made is totally specious, as again there is absolutely no evidence whatsoever in the record of this cause, and as most Floridians are aware that BLUE CROSS is a not-for-profit corporation. RYDER cited Purdy vs. Gulf Breezes Enterprises, Inc., 403 So. 2d. 1315, 1329 (Fla. 1981) for the proposition that the legislature "intended to shift the burden of paying these medical care costs away from the automobile insuror and onto the health care insuror". Such a contention is outrageous when clearly Purdy states:

"These sections [including the Collateral

> Source Statute] merely prevent injured plaintiffs from recovering money which, equitably speaking, belong to their insurors (emphasis supplied)." Purdy, supra, at 1329.

Further, Purdy speaks of a legislative goal of reducing suits only" . . . among automobile insurance carriers, . . ." and does not in any way advocate reducing suits among health insurance carriers and the automobile insurance carrier of the negligent tortfeasor. The Purdy case addresses only automobile insurors and reimbursement of personal injury protection payments. There is not even the slightest suggestion in Purdy that a health insurance carrier should not be able to recover money it pays out on behalf of its subscriber. Rather Purdy strongly suggests that equity requires that health insurance carriers be entitled to recover those monies which equitably belong to them.

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.

As stated in this Petitioner's Initial Brief on the Merits, the common law rights of indemnification enuring to BLUE CROSS is fully existant. Contrary to RYDER'S argument below, and contrary to the ruling of the Third District Court of Appeal, BLUE CROSS' common law claim for indemnification is firmly based

in all the authorities cited to this Court in the Petitioner's Initial Brief. Clearly, BLUE CROSS was not in any way at fault, but had to discharge its duty to its subscriber, a duty which should have been discharged by RYDER who bore the whole fault. Thus the entire loss should be borne by RYDER.

Nevertheless, RYDER contends that the Collateral Source Statute does not unconstitutionally deprive BLUE CROSS of either its contractual subrogation rights or of its rights to common law indemnification. RYDER premises its argument on this court's decision in Purdy which RYDER says upheld the constitutionality of a predecessor statute which should thus constructively uphold the constitutionality of the present statute. To the contrary, and as discussed in Argument I above, Purdy made no ruling whatsoever regarding health insurance carriers, and the statute involved in Purdy did not preclude any payment by the tortfeasor to the injured plaintiff. Instead, the statute under review in Purdy simply allowed the admission into evidence of the total amount of all collateral sources paid and the corresponding amounts paid by the claimant to secure such collateral sources, but did not require those amounts to be deducted from the verdict as does the current wording of the statute. Clearly, Purdy did not uphold the constitutionality of the present statute, nor can it be construed to do so under the facts of this case.

Therefore, prior to the effective date of the 1979

statute in contention here, BLUE CROSS had the rights of both subrogation and indemnification. Rodriguez vs. Travelers Ins. Co., 367 So. 2d. 687 (Fla. 3 DCA 1969); Blue Cross and Blue Shield of Florida, Inc., vs. O'Donnell, 230 So. 2d. 706 (Fla. 3 DCA 1970). If the District Court's decision is that BLUE CROSS' subrogation right was destroyed by the Collateral Source Statute, then in order for such decision to withstand constitutional scrutiny, either there must be created a new right in favor of BLUE CROSS or there must be an existing right through which BLUE CROSS could pursue its claim. BLUE CROSS contends that the existing right is that of indemnification, and that the Collateral Source Statute has no effect upon it. However, assuming arugendo, if the Collateral Source Statute or any court's interpretation of it destroyed both BLUE CROSS' subrogation right and its indemnifcation right, and did not create any substitute right, then according to Kluger the statute has to be unconstitutional. Kluger vs. White, 281 So. 2d. 1 (Fla. 1973). BLUE CROSS does not believe, however, that this is a required construction or interpretation of Section 627.7372, rather, its constitutionality can be upheld if BLUE CROSS is allowed to either enforce its right of indemnification or its right of subrogation directly against RYDER.

RYDER attempts to ameliorate the deterimental aspect of

the Collateral Source Statute by showing that if the injured subscriber and his or her health insurance carrier were to forego their health insurance benefits, then the Collateral Source Statute would be constitutional. The example used by RYDER, that the injured person simply waive the right to recover from BLUE CROSS, and/or BLUE CROSS simply not pay the injured subscriber until the litigation with the third party tortfeasor was completed is ludicrous! No rational person could ever assume the legislature would intend such a severe economic impact upon the citizens of this State so as to require them to forego payment for medical services for months or years while litigation with the tortfeasor drags through the courts. Nor can BLUE CROSS imagine the Insurance Commissioner allowing such an exclusion in health insurance policies. On the other hand, this is not to say that BLUE CROSS intended to underwrite the costs of medical expenses arising out of injuries to its subscriber caused by the negligence of third parties. To the contrary, BLUE CROSS specifically drafts its insurance policies to include a subrogation clause, with the expectation that the negligent party will ultimately be responsible for such medical expenses. This result can be achieved through either subrogation or indemnification. However, to allow neither would clearly be unconstitutional. Thus the decision of the Third District

Court of Appeal must be overturned.

III. THERE IS AN ABSOLUTE AND COMPLETE BASIS FOR THIS COURT TO ACCEPT JURISDICTION OF THIS MATTER.

BLUE CROSS is certain that this Court neither hastily nor lightly entered its Order Accepting Jurisdiction and Setting Oral Argument which was rendered February 25, 1986. Evidently RYDER does not share this view, and insists on once more arguing jurisdiction.

The position of BLUE CROSS at this time is the same as that set forth in its Jurisdictional Brief and, briefly stated, is:

a. The opinion of the Third District Court of Appeal expressly and directly conflicted with decisions of this court and other District Courts of Appeal that the right of indemnity accrues to one who has discharged the duty which is owed by him but which, as between himself and another, should have been discharged by the other, such conflict being sufficient to invoke the jurisdiction of this court. Houdaille, supra, Mims, supra; and Stewart vs. Hertz Corporation, 351 So. 2d 703 (Fla. 1977).

b. The opinion of the Third District Court of Appeal that the trial court properly dismissed with prejudice BLUE CROSS' claim under authority of Section 627.7372, Florida Statutes, was an express declaration of the validity of that statute, sufficient to invoke this court's jurisdiction.

c. The Third District Court of Appeal's denial and overruling of BLUE CROSS' argument relating to denial of its right of access to the courts was an express construction of Article I, Section 21, Florida Constitution, sufficient to invoke this court's jurisdiction. Rebozo vs. Royal Indemnity Co., 369 So. 2d. 644 (Fla. 3rd DCA); Allstate, supra; Kluger, supra.

CONCLUSION

Contrary to the rulings of the trial court and the Third District Court of Appeal below, BLUE CROSS does have a right to indemnification (and, although not necessary for a ruling in this case, also a right of subrogation) against RYDER in this action. Its right to indemnification springs from the injury to BLUE CROSS' subscriber which was caused by RYDER and for which BLUE CROSS paid medical benefits. Such medical expenses should rightfully be paid by RYDER. BLUE CROSS' common law right to indemnification preceded the effective date of the Collateral Source Statute, thus any interpretation of that statute which destroys BLUE CROSS' right to indemnification would necesssarily also be unconstitutional. Unless this court authorizes continued subrogation and/or indemnification actions by health insurance companies against automobile accident tortfeasors and their automobile insurance companies, then the Collateral Source Statute is unconstitutional as applied to such health insurance companies. 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; and that, if liability against RYDER is determined, that BLUE CROSS has a right

to recover the benefits it has paid on behalf of Mrs. Montesino.

Respectfully submitted,

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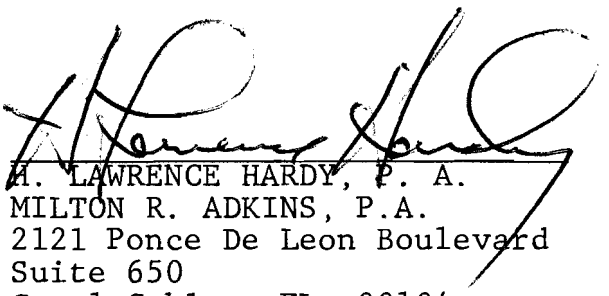
BY: H. LAWRENCE HARDY

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing Reply Brief on the Merits was mailed this 12th day of May, 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, FL 33601.



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