O/a 6-4-86

IN THE SUPREME COURT OF FLORIDA

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.,

Appellant,

vs.

TIMOTHY L. MATTHEWS, et al.,

Appellees.

SUPREME COURT CASE NO. 67,598

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.,

Appellant,

vs.

RYDER TRUCK RENTAL, INC., et al,

Appellees.

SUPREME COURT CASE NO. 67,591

AMICUS CURIAE BRIEF OF JACK ECKERD CORPORATION

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
ISSUE ON APPEAL	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
THE COLLATERAL SOURCE RULE (§627.7372) IS UNCONSTITUTIONAL AS APPLIED TO HEALTH INSURANCE CARRIERS SINCE IT ABOLISHES THEIR RIGHT TO SUBROGATION WITHOUT PROVIDING A SUBSTITUTE REMEDY	5
A. The collateral source rule and subrogation	5
B. The unconstitutional abolition of health insurers' subrogation rights	6
C. District courts of appeals decisions	9
D. The collateral source rule may be held constitutional as applied to health insurance carriers if this Court recognizes a direct right of action by health insurance carriers against tortfeasors	15
CONCLUSION	18
CERTIFICATE OF SERVICE	19

TABLE OF CITATIONS

	Page
Atlantic Coast Line Railways v. Campbell, 104 Fla. 274, 139 So.2d 886,888 (1932).....	6
Blue Cross & Blue Shield of Florida, Inc. v. King, 479 So.2d 278 (Fla. 2d DCA 1985).....	13
Blue Cross & Blue Shield of Florida, Inc. v. Matthews, 473 So.2d 831 (Fla. 1st DCA 1985).....	13
Blue Cross & Blue Shield of Florida, Inc. v. Ryder Truck Rental, Inc., 472 So.2d 1373 (Fla. 3d DCA 1985).....	12
Champion v. Gray, 478 So.2d 17 (Fla. 1985).....	17
Crislip v. Holland, 401 So.2d 1115, 1117 (Fla. 4th DCA 1981), review denied, 411 So.2d 380 (Fla. 1981).....	16
Faulkner v. Allstate Insurance Company, 367.So.2d 214 (Fla. 1979).....	13,14
Jones v. Bradley, 366 So.2d 1266 (Fla. 4thDCA 1979).....	12
Kluger v. White, 281 So.2d 1 (Fla. 1973).....	6, 7 14,15
Molyett v. Society National Life Insurance Co., 452 So.2d 114, 115 (Fla. 2d DCA 1984).....	11
Nelson v. Ziegler, 89 So.2d 780 (Fla. 1956).....	15
Prince v. American Indemnity Company, 431 So.2d 270 (Fla. 5th DCA 1983).....	10,11
Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325, 1328 (Fla. 1981).....	5, 6 8, 9 10,11 12,13 14

TABLE OF CITATIONS (Cont'd)

	Page
Stahl v. Metropolitan Dade County, 438 So.2d 14 (Fla. 3d DCA 1983).....	15
Stevens v. Jefferson, 436 So.2d 33 (Fla. 1983).....	16
Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So.2d 702 (Fla. 1980).....	6, 18

Other Authorities

SECTION 627.7372, Florida Statutes (1985).....	2, 5, 19
SECTION 627.7372(1), Florida Statutes (1985).....	5
SECTION 627.7372(2)(c), Florida Statutes (1985)...	5
ART. I, §21, Fla. Const.....	6
Instruction 4.10, Florida Standard Jury Instructions (1985).....	15
Prosser and Keeton, Law of Torts, p. 359 (5th Ed. 1984).....	17

STATEMENT OF THE CASE & FACTS

Amicus curiae, Jack Eckerd Corporation ("Eckerd") adopts the statements of the case and facts of Petitioners. Eckerd is presently the appellant seeking to recover $250,000 in employee health benefits from automobile tortfeasors and their insurers in Jack Eckerd Corporation, et al. v. Williamson Cadillac Leasing, Inc. et al., Third District Court of Appeal Case No. 85-1404.

ISSUE ON APPEAL

IS THE COLLATERAL SOURCE RULE (§627.7372) CONSTITUTIONAL AS APPLIED TO HEALTH INSURANCE CARRIERS WHEN IT ABOLISHES THEIR RIGHT TO SUBROGATION WITHOUT PROVIDING A SUBSTITUTE REMEDY?

SUMMARY OF THE ARGUMENT

Eckerd demonstrates that prior to the passage of the collateral source statute, health insurers unquestionably had the right to be subrogated against the tortfeasors for amounts paid to injured insureds. The collateral source statute on its face eliminates the insured's right to recover from a tortfeasor any sums which the insured has received from a collateral source, including a health insurer. Thus, the statute, as construed by district court opinions, implicitly eliminates the health insurer's subrogation rights without replacing them with any other remedy.

The Florida Supreme Court has indicated the collateral source statute may applied to automobile insurers based on the theory that, eventually, all automobile insurers will benefit from the collateral source rule since cases where one company's insured is at fault will balance out the loss of subrogation rights in other cases where that company would have recovered. In other words, the Court has approved the collateral source rule as applied to automobile insurers on the theory that "it all comes out in the wash."

What the district courts of appeal have overlooked in these cases, however, is that health insurers will never benefit from the collateral source rule. Thus, their right to subrogation has been completely abolished without any remedy being substituted. This is an unconstitutional

deprivation of access to courts guaranteed by the Florida Constitution.

Finally, Eckerd suggests a possible alternative to declaring the collateral source rule unconstitutional as applied to health insurers - recognizing a direct action on their part for automobile tortfeasors' negligence. This Court recently recognized those tortfeasors' right to seek recovery from subsequent medical tortfeasors who aggravate automobile injuries. It would indeed be ironic to allow auto tortfeasors such recoveries while making them immune from medical damages caused by their negligence where the injured party has health insurance.

ARGUMENT

THE COLLATERAL SOURCE RULE (§627.7372) IS UNCONSTITUTIONAL AS APPLIED TO HEALTH INSURANCE CARRIERS SINCE IT ABOLISHES THEIR RIGHT TO SUBROGATION.

A. The collateral source rule and subrogation.

Florida's collateral source statute, Section 627.7372, Florida Statutes (1985) provides in pertinent part that in any action for personal injury arising out of the use of a motor vehicle, evidence of all payments from collateral sources made to the claimant shall be admitted and the jury shall deduct from any award those benefits received by the claimant. §627.7372(1), Florida Statutes (1985). The statute defines "collateral sources" to include any payments made to the claimant pursuant to any contract of any group to pay for medical services. §627.7372(2)(c) Florida Statues (1985). 1/

Prior to the passage of statutes reforming automobile insurance in the 1970's, an injured automobile claimant's insurer - whether an insurer under an automobile or health policy - had a recognized right to be subrogated to the

1/ The current version of the collateral source statute reflects moderate amendments to the 1977 version considered in Purdy, but those amendments are not significant for the purposes of the issues presented in these cases.

claimant's recovery. 2/ E.g., Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325, 1328 (Fla. 1981); Atlantic Coast Line Railways v. Campbell, 104 Fla. 274, 139 So. 886, 888 (1932).

The collateral source rule eliminates an injured party's right to recover for losses paid by his health insurer, and therefore implicitly eliminates the health insurer's right to subrogation.

B. The unconstitutional abolition of health insurers' subrogation rights.

It is obvious that Blue Cross and Eckerd's rights to subrogation, as health insurers, have been abolished by the district courts' application of the collateral source statute and that these health insurers have not been provided any substitute remedy. Kluger v. White, 281 So.2d 1 (Fla. 1973) is the landmark case holding that a complete abolition of a prior right of action violates the right of access to courts as guaranteed by the Florida Constitution, 3/ absent either "a reasonable alternative to protect the rights of the people

2/ Subrogation is an equitable doctrine which allows a party required to pay a legal obligation owed by another to step into the shoes of the injured party and assert the latter's original claim against the wrongdoer. Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So.2d 702 (Fla. 1980).

3/ "The courts shall be open to any person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. I, §21, Fla. Const.

of the state to redress for injuries" or a legislative showing of "an overpowering public necessity for the abolishment of such right." In the context of health insurers, there has clearly been a complete abolition of their right to subrogation without any alternative to protect their rights. 4/

The plight of the health insurer presents a much stronger case for the denial of access to the courts than was presented in Kluger v. White. In Kluger this Court struck down a statute abolishing the right of a party to sue for property damage to his vehicle arising from an automobile accident unless the property damage exceeded $550 (or the party had chosen not to insure for property damage). The Court struck down this portion of the Florida Automobile Reparations Act, finding that it was unconstitutional based on the denial of the access to courts for a plaintiff who had suffered such damage to his car. Clearly, if the elimination of a right to recover $550 for property damage to an automobile is a denial of the right of access to courts, then depriving health insurers of their subrogation rights

4/ There has also been no showing of an "overpowering public necessity" for the abolishment of a health insurer's rights. As discussed below, even if reducing litigation among automobile insurers is enough to justify a collateral source statute which has not totally abolished their rights since they still receive some benefit from the collateral source rule, it provides no basis for suggesting some overwhelming need to prevent health insurers from recovering from tortfeasors.

totalling millions against auto tortfeasors, without providing any alternate remedy, is a much more egregious constitutional denial.

In Purdy the injured plaintiffs (individual insureds) were challenging the constitutionality of the collateral secure statute on the grounds that it violated their guarantee of access to courts. This Court held that the elimination of a claimant's ability to recover from the tortfeasor sums already recovered from a collateral source did not abolish any previous right since prior to the statute the plaintiff would not have been entitled to keep the full amount recovered in the lawsuit. That is, the plaintiff's insurer had a right of subrogation as to those previous payments. The Court concluded with regard to the collateral source statute and the personal injury protection payments statute (PIP) that "these sections merely prevent injured plaintiffs from recovering monies which, equitably speaking, belong to their insurers." 403 So.2d at 1329.

Thus, Purdy was not specifically addressing the question of the insurer's right of subrogation which had effectively been eliminated by the collateral source rule. However, additional comments in Purdy are instructive. The Court examined the state of the law before the collateral source rule, a period in which there was apparently a great deal of litigation between automobile insurance carriers. 403 So.2d

at 1328-29. The Court discussed the "no-fault" concept of the Florida Automobile Reparations Reform Act and the fact that auto insurers did not recover PIP benefits they paid from other auto insurers. The Court concluded with regard to such automobile insurers:

> The benefits obtained by the tortfeasors will enure to their insurance carriers. Supposedly, these benefits will eventually be shared by all carriers without the need of litigation. [cite omitted]. This should result in lower premiums.

403 So.2d at 1329. Obviously, this logic has no applicability to health insurers who will never benefit from the inability to recover from auto insurers. Purdy simply did not address the effect of the collateral source rule on the health insurers' right of subrogation, since it was not an issue in the case.

C. District courts of appeals decisions.

Subsequent district court decisions, however, have read Purdy to bar a health insurer's right to seek recovery from automobile tortfeasors and their insurers. This is particularly disturbing since this Court's opinion in Purdy rested in significant part upon its observation that the injured plaintiffs were not giving up the right to "the full amount" of their recovery since that money actually belonged to their insurers:

> "This argument assumes that common law plaintiffs were allowed to keep the full amount of money they recovered in a lawsuit, which was not the case. Their right of full recovery was subject to their insurer's right of subrogation. That is, as a matter of equity, it was the insurers who were entitled to bring suit against tortfeasors for reimbursement of any payments made to an insured." 403 So.2d at 1328.

The health insurers this Court said in Purdy were entitled to these monies are now before the Court asking for them.

The district courts, through a misapplication of Purdy, have used it to deny monies to health insurers that Purdy implicitly recognized should receive them. The lower court opinions progressing to this conclusion, while incorrect, can be traced. The first case applying the rationale of Purdy did so to bar an automobile insurance company's attempt to enforce its "subrogation rights" against its own insured. The court in Prince v. American Indemnity Company, 431 So.2d 270 (Fla. 5th DCA 1983) reasoned that in light of the collateral source statute, any money the injured plaintiff would have received must not have been money to compensate for items paid by a collateral source (her insurance company), so that her company had no right to recover those sums from her. Implicitly recognizing the "trade-off" rationale between automobile insurers which justified eliminating collateral sources in Purdy, the court noted that such a result would be "incomprehensible" in a case of a

health or medical policy having no connection whatever with the automobile coverage. 431 So.2d at 272, n.2. 5/

Molyett v. Society National Life Insurance Co., 452 So.2d 1114 (Fla. 2d DCA 1984), simply followed Prince, which it noted contained the same issue of an insurance company's ability to recover from its own insured as in Prince. Significantly, the opinion did not discuss any distinction between an automobile insurer and a health insurer vis-a-vis the abolition of subrogation rights. Namely, the constitutional issue presented in the instant case is nowhere discussed in Molyett.

In Prince and Molyett, the insurance companies were not actually seeking subrogation, but enforcement of subrogation claims against their own insureds in the form of reimbursement. However, the rationale of those cases was next applied to health insurers seeking to directly enforce their subrogation rights against the automobile tortfeasors and their insureds. Although Blue Cross' effort at recovery in the Third District case on petition before this Court was based indemnity, the opinion contained dicta that a party's

5/ The Fifth District stated:

> "We must admit the 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."

right of subrogation was limited by any impediment in the injured party's claim. The dicta concluded that therefore the insurer had no right of subrogation against the wrongdoer. Blue Cross & Blue Shield of Florida, Inc. v. Ryder Truck Rental, Inc., 472 So.2d 1373 (Fla. 3d DCA 1985). However, the cases cited therein as support addressed the situation where there was an impediment to the cause of action itself, such as an adverse judgment against the insured in a previous action based on the claim. 6/ It is disingenuous for automobile tortfeasors to argue that health insurer's subrogation rights have been eliminated because Purdy eliminated the insured's right of recovery, when Purdy did so on the rationale that it was the insurer's money to begin with. Furthermore, the second part of the Purdy rationale - that automobile insurers will all benefit from this in the long run - simply has no applicability to health insurers.

The First District applied a similar rationale in Blue Cross & Blue Shield of Florida, Inc. v. Matthews, 473 So.2d 831 (Fla. 1st DCA 1985), in holding that Blue Cross's right was a "derivative right" and then summarily holding that since it "stands in the shoes" of its insured, it succeeds only to those rights held by its insured. This again overlooks the rationale of Purdy and essentially holds that

6/ See Jones v. Bradley, 366 So.2d 1266 (Fla. 4th DCA 1979).

rights can be abolished in the face of the constitutional guaranty of access to courts, simply by holding they are "derivative rights". 7/

This Court has implicitly recognized in the context of the "no-fault" act that an access to the courts analysis is applicable to derivative claims. In Faulkner v. Allstate Insurance Company, 367 So.2d 214 (Fla. 1979), this Court initially noted that Mrs. Faulkner's claim for loss of consortium was derivative and wholly dependent on her husband's ability to recover for his injuries in an automobile case. This Court went on to note that:

> The "access to the court's" argument which prevailed in Kluger is not applicable since the spouse's claim is not abolished. It is merely limited, for reasons of sound public policy, to cases in which the injured spouse has met the threshhold requirements."

367 So.2d at 217. Thus, this Court's opinion in Faulkner clearly indicates that where a derivative claim is being abolished, that a Kluger "access to courts" analysis is required. In the context of these health insurers, their rights are not being limited, but are clearly being completely abolished. And they are receiving nothing in exchange, contrary to the situation of automobile insurers.

7/ The Second District followed Matthews and Ryder without further elaboration in Blue Cross & Blue Shield of Florida, Inc. v. King, 479 So.2d 278 (Fla. 2d DCA 1985).

Unlike Purdy where automobile insurers who lose subrogation rights in one accident will be benefited by the inability of another insurer to seek subrogation from them in a different accident where their insured is at fault, the health insurer never benefits from the loss of subrogation. That is, no automobile insurers would ever be seeking subrogation from a health insurer for injuries caused by its insured in an automobile accident. There is no justification for imposing damages caused by negligent driving upon health insurers through an unconstitutional deprivation of their subrogation rights.

D. The collateral source rule may be held constitutional as applied to health insurance carriers if this Court recognizes a direct right of action by health insurance carriers against tortfeasors.

As discussed above, the collateral source rule eliminates health insurers' longstanding common law subrogation right. As Kluger indicates, unless a reasonable alternative to the elimination of this subrogation right is provided, the collateral source rule is unconstitutional as applied to health insurers. The alternative available is to permit a direct action by health insurers against tortfeasors. This direct action would not subject the defendant tortfeasors to any new liability, since they have traditionally been liable for medical damages their negligence caused.

Florida courts have long recognized that the operator of a motor vehicle incurrs a legal duty to exercise reasonable care for the safety of others. See, e.g., Nelson v. Ziegler, 89 So.2d 780 (Fla. 1956); Instruction 4.10, Florida Standard Jury Instructions (1985). Florida courts usually determine legal cause by the foreseeability test. See, e.g., Stahl v. Metropolitan Dade County, 438 So.2d 14 (Fla. 3d DCA 1983). Unquestionably, it is foreseeable that if tortfeasors operate or permit a motor vehicle to be operated so as to cause injury to another person, that person will incur medical costs which will be paid by that person or the person's health insurer.

Florida courts define a defendant's duty by determining if a plaintiff is in the "zone of risks" reasonably forseeable by the defendant. Crislip v. Holland, 401 So.2d 1115, 1117 (Fla. 4th DCA 1981) review denied, 411 So.2d 380 (Fla. 1981); approved in Stevens v. Jefferson, 436 So.2d 33, 35 (Fla. 1983). Crislip also holds that it is not necessary for the tortfeasor to be able to forsee the exact nature and extent of the injuries, but only "that some injuries will likely result in some manner as a consequence of his negligent acts." 401 So.2d at 117, original emphasis.

To recognize a direct cause of action for health insurers in this situation would not actually extend a defendant automobile tortfeasor's duty or zone of risk. Prior to the collateral source rule, the same medical expenses the health

insurers seek to recover here were recoverable by the injured party directly from the tortfeasor. The direct cause of action would not extend the tortfeasor's zone of risks, but merely substitute the health insurers for the injured victim of a tortfeasor's negligence. Thus, Eckerd does not ask this Court to award any damages that would not traditionally have been awarded.

In discussing the concept of duty, Professor Prosser states:

> Various factors have undoubtedly been given conscious or unconscious weight, including convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, the moral blame attached to the wrongdoer, and many others. Changing social conditions lead constantly to the recognition of new duties. No better statement can be made, than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.

Prosser and Keeton, Law of Torts, p. 359 (5th Ed. 1984).

Reevaluating the concept of duty is evident in this Court's recent decision in Champion v. Gray, 478 So.2d 17, 20 (Fla. 1985), modifying the "impact rule" to allow recovery for a "significant discernable physical injury when such injury is caused by physical trauma resulting from a negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing the injury, is forseeably injured." Similarly, health insurers are clearly forseeably injured by automobile tortfeasors. Moreover, the direct action suggested here is

not even a departure of the nature approved in Champion, since auto tortfeasors have traditionally been responsible for medical damages they cause.

The concept of recognizing a direct action to replace health insurers lost subrogation rights is analagous to this Court's recent recognition of a right of subrogation in Underwriters at Lloyds v. City of Lauderdale Lakes, supra. In Underwriters, the court held that an initial tortfeasor (automobile driver) could sue a successor tortfeasor (a malpracticing doctor) in subrogation for aggravating the original injury. The Court reasoned that "under this doctrine the financial burden is equitably apportioned among the responsible parties, and negligent doctors can no longer escape liability for their actions." Id. at 704. If Florida is prepared to let tortfeasor drivers sue in subrogation to reduce their responsibility for damages, then completely innocent health insurers should be permitted to sue those tortfeasor drivers and their insurers - so that they "can no longer escape liability for their actions."

In the words of Professor Prosser, it is time to recognize a duty on behalf of negligent automobile drivers that permits health insurers to sue directly for payments they have been required to make to their insureds. Recognition of this duty would render the collateral source statute constitutional and would shift the loss and blame to the party responsible. This would not constitute a major

departure from traditional law holding negligent automobile drivers responsible for the medical losses of people they injure.

CONCLUSION

The defendant tortfeasors and their insurers have not paid for the significant medical damages they caused which were paid by Eckerd and Blue Cross as health insurers. Under the present case law, Blue Cross and Eckerd's subrogation rights have been abolished by the application of the collateral source statute. Since no alternative remedy was provided to the health insurers, the abolishment of subrogation rights constitutes a denial of access to courts and is unconstitutional. For these reasons, this Court should declare Section 627.7372, Florida Statutes (1981) unconstitutional as applied to health insurers and reverse the district courts of appeals' opinions. In the alternative, this Court should recognize a direct action in negligence by health insurers against automobile tortfeasors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail to Edward P. Nickinson, III, Esquire and Doreen Spadorcia, Esquire, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., P.O. Box 12426, Pensacola, Florida 32582; John N. Boggs, III, Esquire, P.O. Box 1937 Panama City, Florida 32402; William W. Tharpe, Jr., Esquire and Lisa S. Santucci, Esquire, Department of Insurance, 413-B Larson Building, Tallahassee, Florida 32301; Alan C. Sunberg, Esquire, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., P.O. Box 190, Tallahassee, Florida 32302; H. Lawrence Hardy, Esquire, Adkins & Hardy, 2121 Ponce De Leon Boulevard, #65 Coral Gables, Florida 33134; and to Andrew Needle, Esquire, Spence, Payne, Masington, Grossman & Needle, 2950 S.W. 27th Avenue, Suite 300, Miami, Florida 33133, this 20th day of March, 1986.

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