o/a 6-4-86

IN THE SUPREME COURT OF FLORIDA

BLUE CROSS AND BLUE SHIELD
OF FLORIDA, INC.,

Appellant,

vs.

DOCKET NO.: 67,598

TIMOTHY L. MATTHEWS,
et al.,

Appellees.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATMENT

STATEMENT OF THE CASE AND FACTS

Respondents, Timothy L. Matthews, et al., adopt the Preliminary Statement and Statement of the Case and Facts as stated by petitioner, Blue Cross and Blue Shield of Florida, Inc.

SUMMARY OF ARGUMENT

The Legislature of Florida has express power to institute legislation for the public welfare, even in instances where it modifies or nullifies common law principals. Both subrogation and the Collateral Source Rule have recently been effected by legislative enactment as more specifically stated in 627.736(3) and 627.7372, Florida Statutes (1985).

The alterations in these common law principals were based upon overwhelming public need as condoned by Kluger v. White, 281 So.2d 1 (Fla. 1973), or alternatively the reasoning of Purdy v. Gulf Breeze Enterprises, Inc., et al., 403 So.2d 1325 (Fla. 1981).

The rights of Blue Cross stem from a contractual subrogation provision giving the Health Care Provider succession rights its Members have against third-party tort feasors, with possible amplification from common law subrogation principals. These rights are "derivative" under any analysis and the logical extension of Purdy creates abolishment to Blue Cross.

If the subrogor has not been denied access to the courts, the subrogee "standing in the same shoes" must abide by the same standard.

Quite simply, Blue Cross has not lost its position in the marketplace because its classification with other Health Care Providers has not been effected, and can control its own destiny

by adjusting its rate structure as needed to counteract the effects of the No-Fault Statutes.

Having failed to show discrimination, classification or deprivation of a personally guaranteed right, the decision of the First District Court of Appeals should be affirmed against Blue Cross.

ARGUMENT

I. CONSTITUTIONALITY OF 627.736(3) AND 627.7372, FLORIDA STATUTES (1985)

A. THE PRINCIPAL OF SUBROGATION CREATES ONLY A QUALIFIED RIGHT, DERIVATIVE IN NATURE, AND §627.7372 FLORIDA STATUTES (1985) IS NOT UNCONSTITUTIONAL AS APPLIED TO BLUE CROSS

Blue Cross claims it has suffered an unconstitutional deprivation of its "access to the courts" to enforce the following provision of a contract its Alabama affiliate had with a Florida corporation, more particularly identified as Tieco, Inc.:

> In the event of payment or provision otherwise by the Company of any benefits under this Contract, the Company shall, to the extent thereof, be subrogated and shall succeed to all rights of recovery (whether in contract, tort, or otherwise) which the Member or any other person has against any person or organization and shall be subrogated and succeed to the proceeds of any settlement or judgment that may result from the exercise of any such rights of recovery. Upon payment or provision by the Company of any such benefits, the Member or any other person having any rights of recovery or proceeds therefrom shall execute and deliver such proceeds or such instruments or papers and do whatever else is necessary to secure to the Company such rights of recovery and proceeds and shall do nothing to prejudice such rights. (Appendix to Respondent's Reply Brief at Page 1)

The above provision succinctly provides that Blue Cross shall succeed, through the concept of subrogation to all rights of recovery which the Member has against any other person. The very

language of its own policy restricts the rights of Blue Cross to only those rights its members have.

The "Member" contemplated by the above quoted subrogation provision falls within the same public classification as the injured plaintiff in Purdy v. Gulf Breeze Enterprises, Inc., et al., 403 So.2d 1325 (Fla. 1981), which this Court has already proclaimed as not being denied access to the courts of this State.

The central question on the subrogation issue is whether this court's pronouncement in Purdy extends from the tort victim/insured to Blue Cross, the Health Care Provider.

Clearly, Tieco employee and Blue Cross insured, Paul Tyson, is precluded from recovering against defendants, Timothy Matthews, et al., the $18,844.44, in medical payments he elected to collect under his health insurance contract with Blue Cross.

At the outset, petitioner takes the position that the wisdom of this court in Purdy and the District Courts in Prince v. American Indemnity Company, 431 So.2d 270 (Fla. 5th DCA 1983); Molyett v. Society National Life Insurance Company, 452 So.2d 1114 (Fla. 2d DCA 1984); and Zielinski v. Progressive American Insurance Company, 453 So.2d 487 (Fla. 2d DCA 1984), is based upon "impeccable logic". However, petitioner then seeks to distinguish that impeccable logic by separating Blue Cross from the classification of Purdy, and place it in a class more closely aligned with Kluger v. White, 281 So.2d 1 (Fla. 1973).

In Purdy the plaintiff was denied the common law privilege of a "double recovery." This privilege stemmed from the long-standing judicial policy that a tort feasor should not be allowed a windfall for damages he caused simply because the tort-victim was conscientious enough to have bought and paid for separate health care protection.

The "Collateral Source Rule" has long been a part of Florida Jurisprudence and until enactment of §627.736(3) and §627.7372, Florida Statutes, (1976 and 1977), was a traditional common law concept followed uniformely by our courts. As stated recently in Jones v. Baptist Hospital of Miami, Inc., 349 So.2d 672 (3d DCA 1977):

> Florida follows the collateral source rule which stands for the proposition that total or partial compensation received by the injured party from a collateral source wholly independent of the wrongdoer will not operate to lessen the damages recoverable from the person causing the injury. See Finley P. Smith, Inc. v. Schectman, 132 So.2d 460 (Fla.2d DCA 1961); Paradis v. Thomas, 150 So.2d 457 (Fla.2d DCA 1963); Greyhound Corporation v. Ford, 157 So.2d 427 (Fla.2d DCA 1963); Walker v. Hilliard, 329 So.2d 44 (Fla.1st DCA 1976).
>
> As stated in Walker v. Hilliard, supra, it is well settled that recovery of damages from a tort feasor may not be reduced by the amount of insurance proceeds received by the injured party from his insurance company; a wrongdoer should not be permitted to benefit from a policy of insurance where there is no privity between him and the plaintiff's

> insurer, and the policy was written for the benefit of the insured and not the wrongdoer; if there must be a windfall, it is more just that the injured party profit, rather than the wrongdoer be relieved of full responsibility for his wrongdoing. The value of services rendered the injured party are a proper element of damages even though they were paid for by a collateral source. Paradis v. Thomas, supra.

This court, in Purdy, very effectively reasoned that under modern day standards, elimination of collateral source benefits in automotive accident cases created a classification bearing a reasonable relation to the legislative goal of reducing litigation among automobile insurance carriers and therefore not in violation of the equal protection clause of the constitution. (Purdy, supra, 403 So.2d at 1329).

In dictum, the Purdy opinion reasoned that plaintiffs were not allowed to keep collateral source benefits anyway since as a matter of equity their insurers were entitled to bring suit against tortfeasors for reimbursement. (Purdy, supra, 403 So.2d at 1328).

This is not a completely accurate assumption since often times the collateral source benefits were not subject to subrogation recoveries. Unfortunately, however, this court's gratuituous comments concerning subrogation recoveries has been seized upon by Blue Cross as a substantive basis for its argument to declare Florida Statutes, §627.7372 unconstitutional.

The importance of beginning this brief with an acknowledged emphasis of the well-established common law principal known as the Common Source Rule is to lead into another long-standing common law principal, to-wit; subrogation. The very nature of subrogation reveals it be an equitable doctrine, springing out of the right to contribution and having has its objective a prevention of injustice. It is not a matter of strict right, nor does it necessarily rest on contract, but is purely equitable in nature and will not be enforced when it would work an injustice to the rights of those having equal equities. Appleman, Insurance Law and Practice, §6502 (1944); 16 Couch on Insurance, §61.20 (2d Ed. 1983); USF&G v. Bennett, 119 So. 394 (1928).

A party claiming through subrogation is required to claim through a derivative right, which presupposes an original right. For a right to be subrogated, such right must exist in the person from whom it is taken. The party for whose benefit the doctrine of subrogation was excised is deemed to acquire no greater rights than those of the party from whom he was substituted. Appleman, Insurance Law and Practice, §6505, Blue Cross and Blue Shield of Florida, Inc. v. Timothy L. Matthews, et al., Case Number BD-67 (1st DCA 1985), ROA-1. It is often said with regard to subrogation that the subrogee "stands in the shoes" of the subrogor, and as such gains equitable, derivative rights against the wrongdoer. The contract that Blue Cross has with its insured, Paul Tyson, recites this principal only slightly dif-

ferent by saying that it shall be "subrogated and succeed to the proceeds of any settlement or judgment that may result from the exercise of the member's rights of recovery."

Petitioners argue initially that a very narrow construction by this court could uphold the constitutionality of §627.7372 by construing it to apply only to collateral source recoveries of the insured and not to subrogated recoveries of his insurer. In making this argument, respondent fails to recognize the wording and intent of said statute and also the contractual connotation of the word "succeed" and the historical use of the word "derivative" by the courts of this state. Additionally, petitioner incorrectly draws support from Holyoke Mutual Insurance Company In Salem v. Concrete Equipment, Inc., 394 So.2d 193 (Fla. 3d DCA 1981) pet. for rev. den., 402 So.2d 609 (Fla. 1981). The Holyoke decision is used by petitioner to highlight its "Catch-22" argument although a close analysis of Holyoke reveals just the opposite. In Holyoke, the Third District allowed a valid subrogee to overcome a procedural technicality under the Real Party in Interest rule, but steadfastly maintained that it was doing so because a "technical bar" to litigation was not related to the subrogor's cause of action. Holyoke, supra., 394 So.2d at 197.

This court in Purdy eliminated the insured-subrogor's collateral source cause of action and declared Florida Statutes §627.7372 and 627.736(3) constitutional. If "derivative" means

"derivative" then certainly the subrogation rights of Blue Cross have been eliminated also.

B. LEGITIMATE AND LEGISLATIVE ENACTMENT AND THE LACK OF STANDING BY BLUE CROSS COMBINED TO COUNTERACT ITS "ACCESS TO THE COURT" ARGUMENT.

Respondents next take the position that subrogation is a constitutionally guaranteed right protected by Article I, §21, Florida Constitution, and subsequent pronouncement of this court in Kluger v. White, supra. At the outset, respondents contend that "subrogation" is not a "right" reaching the dignity envisioned by Article I, §21, which grants access to the courts of our state to every person for redress of any injury so as to perpetuate uniform justice.

It is well settled that the legislature has the right to eliminate certain common law rights. Florida Statutes §2.01, on its face, recognizes English Common Law, provided the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

As stated generally, in Fla.Jur. 2d, STATUTES §8, RELATIONSHIP OF STATUTORY LAW TO COMMON LAW:

> The constitution and statutes of Florida control and take precedence over the common law when there are any inconsistencies between them. Thus, the common law may be modified, directly or indirectly, by the enactment of a statute that is inconsistent with it, even if it limits or restricts, sub-

> stantially changes, or entirely abrogates a rule of the common law. General and comprehensive statutes designed to regulate an entire subject supersede all common-law rules and the premises.

This court has long recognized the legislature's right to modify common law by a statutory enactment so long as a person's constitutional rights were not violated in the process. Kluger v. White, supra. As pronounced in Kluger, even a constitutional right can be abolished if the legislature can show "an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." The legislature of this state, by its constant refinement of the no-fault concept of automobile insurance, has spoken plainly that "public policy transcends in-fighting" within the insurance industry. Faced with skyrocketing automobile insurance rates, health costs and personal injury claims, the legislature has set its goal at lowering these public expenses. One such effort was to eliminate collateral and double recoveries by tort victims. This court in Purdy has up-held this concept as constitutional. Blue Cross argues that since it is not an automobile insurance writer, it has no alternative remedy or advantage, although, a close analysis of this position reveals otherwise. Blue Cross is lumped into the same classification as all other health care providers doing business in the State of Florida. "Collateral Sources" are defined under Florida Statutes,

627.7372(b) as "any health, sickness or income disability insurance...." Blue Cross, therefore, is left with the competitive advantages it shared before enactment of the statutes in question since it applies uniformly throughout the health insurance industry. Although Blue Cross has failed to provide statistics comparing benefits paid in automobile insurance cases to situations of injury and illness where subrogation does not exist, respondent strongly suggests to this court that subrogation recoveries, especially in view of equitable distribution principals, play a very small part of petitioners overall rate structure. Finally, if this court were to reinstate the right of subrogation to health care providers, the practical effect would be to require the automobile insurance industry to pay additional damages under its liability coverage. Blue Cross downplays this point, but this court should recognize that the ultimate goal of Blue Cross is to seek reimbursement from automobile insurers and only secondarily the tort feasors. This legislature's perception of the insurance industry squabbling over subrogated recoveries and equitable distribution brought about systematic modifications in the Florida Automobile Reparations and Reform Act even though arguably, it benefitted tort feasors under some situations. Purdy, supra., 403 So.2d at 13 (29).

Borrowing from the eloquency of this court in Gates v. Foley, 247 So.2d 40 (Fla. 1971):

> The law is not static. It must keep pace with changes in our society, for the doctrine of stare decisis is not an iron mold which can never be changed. Holmes, in his The Common Law (1881), p. 5, recognizes this in the following language:
>
> > The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the customs, belief, or necessity disappear, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and centers on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.
>
> It may be argued that any change in this rule should come from the Legislature. No recitation of authority is needed to indicate that this Court has not been backward in overturning unsound precedent in the area of tort law. Legislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly non-statutory, when we refuse to reconsider an old and unsatisfactory court-made rule.

The legislature and indeed the courts have a duty to remold and re-apply old standards so as to fit them to modern conditions. When the reason for a rule of law has changed, the rule itself should no longer stand and a new rule in harmony with

changed conditions should be recognized. Reduced to its lowest common denominator that is what this appeal is all about. Blue Cross wishes to "hang" onto its contractual and previously allowed right of subrogation. The legislature has decided otherwise, basing its decision on a public outcry to lower the cost of insurance.

The pure basis of subrogation as contemplated by Dantzler Lumber Co. v. Columbia Gas Co., 115 Fla. 541, 156 So. 116 (1934), when the Supreme Court quoted older text in its definition of subrogation, is a thing of the past. Now, instead of an isolated occurrence wherein an insurance company tracks down a tortfeasor and demands repayment for proceeds paid to the victims, entire departments exist within the insurance industry to engage in the daily ritual of swapping money among themselves.

Blue Cross Blue Shield, because it has not lost its competitive advantage within its sphere of operation, should be viewed no differently than any other business that charges a price for a product. In this regard, the First District Court of Appeal case of Alterman Transport Lines, Inc. v. State, 405 So.2d 456 (Fla. 1st DCA 1981), appears applicable. The Alterman decision was a similar case involving an attempt by members of the trucking industry to declare the Florida Sunshine Act unconstitutional. The court ruled:

> It is our view that the deprivation of Appellants' privilege to be immune from competition is not the type of injury

> protected by Kluger and its progeny. Appellants have not been denied entry into the market, nor have they been prohibited from exercising their competitive rights. Their 'injury', if any, is competition in the market place. Id. at 459.

As to the issue of standing, the court held

> Appellant carriers also argue that the repeal of Chapter 323 unconstitutionally deprives Florida consumers of their access to the courts to bring suit to stop the abandonment of unprofitable routes or to challenge the setting of motor carrier rates. However, carriers previously regulated by Chapter 323 had no standing to raise such issues. See State v. Philips, 70 Fla. 340, 349, 70 So. 367 (1915). Therefore, they cannot claim to have been deprived of a right of access which they never had. Id. at 459.

It is well established that to raise a constitutional question, one must show that the statute deprives him of a constitutional right. 16 Am.Jur. 2d, Constitutional Law §189. Further, the constitutionality of a statute which removes one's right to reimbursement or other relief from a second party cannot be contested by a third party whose right, if any, is derivative or indirect. Hanson v. Raleigh, 63 N.E.2d 851; Alterman Transport Lines, Inc., supra; Acme Moving and Storage Company of Jacksonville v. Mason, 167 So.2d 555 (Fla. 1964); State v. Phillips, 70 So. 367, (Fla. 1915).

Constitutional challenges to state statutes on equal protection grounds must show that the statutes create a classifi-

cation in which one class receives discriminatory treatment. Sections 627.736(3) and 627.7372, Florida Statutes, do not, on their face, create a classification of insurers. The statutes apply to all insurers. Assuming, arguendo, that as applied, these statutes do create a classification in which Blue Cross and other health insurers receive discriminatory treatment, it does not necessarily follow that there is an equal protection violation. The rationale basis test must be applied. Since this class is not "suspect" (such as one based on race or sex) strict scrutiny is not required. After a thorough review of equal protection cases, the First District Court of Appeal determined that the proper standard of the rational basis test to be used for purposes of minimal scrutiny is the "some reasonable basis" standard. Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983). This court stated:

> We now turn to the proper method of employing the rational basis test by use of the 'some reasonable basis' standard. Generally, as long as the classificatory scheme chosen by the legislature rationally advances a legitimate governmental objective, courts will disregard the methods used in achieving the objective, and the challenged enactment will be upheld. Citations omitted. Id. at 216.

The "rational basis" test obviously involves considerable deference to the legislature branch, and prohibits the judiciary from substituting this judgment as to whether the legislature has chosen the "right" classifications. As the Supreme Court

stated in Northridge General Hospital, Inc. v. City of Oakland Park, 374 So.2d 461, 464-465 (Fla. 1979):

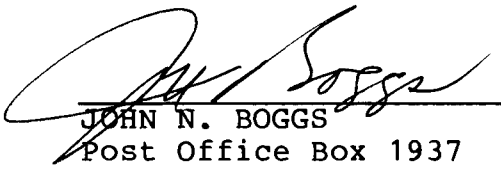
> The legislature has wide discretion in creating statutory classifications. There is a presumption in favor of the validity of a statute which treats some persons or things differently from others.
>
> [I]f any state of facts can reasonably be conceived that will sustain the classification attempted by the Legislature, the existence of that state of facts at the time the law was enacted will be presumed by the courts. The deference due to the legislative judgment in the matter will be observed in all cases where the court cannot say on its judicial knowledge that the Legislature could not have had any reasonable ground for believing that there were public considerations justifying the particular classification and distinction made.
> (Emphasis added).

The avoidance of collateral recoveries eliminates double recoveries, inter-insurance company claims disbursements, claims expenses and litigation. These reductions, along with a reduction of automobile insurance premiums are clearly legitimate legislative goals. Since §627.736(3) and 627.7372, Florida Statutes, are legislative attempts to reach that legislative goal, they should be held constitutional and not violative of equal protection.

II. ERISA PREEMPTION

Respondent, Timothy L. Matthews, adopts the position and argument of the Department of Insurance, State of Florida in its Amicus Brief on all issues relating to ERISA Preemption.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Edward P. Nickinson, III, Attorney at Law, Alan C. Sundberg, Attorney at Law, Clifford J. Schott, Attorney at Law, and William W. Tharpe, Attorney at Law, by U. S. Mail this the 18th day of April, 1986.

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