IN THE SUPREME COURT OF FLORIDA

JACK ECKERD CORPORATION and TRAVELERS INSURANCE COMPANY,

Petitioners,

vs.

WILLIAMSON CADILLAC LEASING, INC., a Florida corporation, CAROLYN S. LIPSHAW, ALICE L. LIPSHAW, FIREMEN'S FUND INSURANCE COMPANY, a foreign corporation, PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY, a foreign corporation, and CHICAGO INSURANCE COMPANY, a foreign corporation, jointly and severally,

Respondents.

SUPREME COURT CASE NO. 68,528

PETITIONERS' BRIEF ON JURISDICTION

CHARLES P. SCHROPP
RAYMOND T. ELLIGETT, JR.
SHACKLEFORD, FARRIOR, STALLINGS & EVANS, Professional Association
Post Office Box 3324
Tampa, Florida 33601
(813) 273-5000
Attorneys for Petitioners

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PRELIMINARY STATEMENT

Petitioners, Jack Eckerd Corporation and Travelers Insurance Company, health insurers in this action, are referred to as "Plaintiffs", the capacity they occupied in the trial court below.

The Respondents, automobile tortfeasors and their insurers, are referred to collectively as "Defendants", the capacity they occupied in the trial court below.

STATEMENT OF THE CASE AND FACTS

Plaintiff health insurers brought this action in the Circuit Court in Dade County against the Defendant automobile tortfeasors and their insurers, seeking to recover $250,000 in medical benefits Plaintiffs paid to Eckerd's employee's dependent under a health policy. (The Defendants settled with the injured party, expressly providing in the settlement agreement that the settlement was in excess and exclusive of the $250,000) (R 4,15). Plaintiffs sought subrogation against the Defendants (R 5). The trial court granted summary judgment for the Defendants on the grounds that Section 627.7372, Florida Statutes (1981), constitutionally barred the Plaintiff health insurers' rights to seek subrogation against automobile tortfeasors and their insurers (R 78, A 1).

The Third District affirmed the summary judgment in a brief opinion relying expressly upon Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325, 1328 (Fla. 1981); Blue Cross & Blue Shield of Florida, Inc. v. Matthews, 473 So.2d 831 (Fla. 1st DCA 1985), and Blue Cross & Blue Shield of Florida, Inc. v. Ryder Truck Rental, Inc., 472 So.2d 1373 (Fla. 3d DCA 1985).

JURISDICTIONAL ISSUES

I. WHETHER THE THIRD DISTRICT'S OPINION CONFLICTS WITH THE FOLLOWING DECISIONS OF THIS COURT:

A. Kluger v. White, 281 So.2d 1 (Fla. 1973) which holds that abolishing a right without providing an alternative remedy violates Florida's constitutional guarantee of access to the courts.

B. Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325 (Fla. 1981) in misapplying that case to health insurance carriers whose subrogation rights stand on a different footing than the automobile insurers considered in Purdy.

C. Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So.2d 702 (Fla. 1980) which recognizes a cause of action by an automobile tortfeasor against a subsequent malpracticing doctor, by denying a health insurer a direct right of subrogation against an automobile tortfeasor.

II. WHETHER THIS COURT SHOULD ACCEPT JURISDICTION TO CONSIDER THE THIRD DISTRICT'S OPINION WHICH DIRECTLY RELIES UPON TWO OTHER DISTRICT COURTS OF APPEALS OPINIONS ACCEPTED BY THIS COURT FOR CONSIDERATION ON THE MERITS.

SUMMARY OF THE ARGUMENT

Plaintiff health insurers demonstrate that the Third District's application of the collateral source rule in Section 627.7372, Florida Statutes (1981), abolishes their right to subrogation without providing a substitute remedy, and is thus unconstitutional as a denial of access to courts.

The Third District misapplied this Court's decision in Purdy. Purdy held explicitly that it was constitutional to deny a common law plaintiff the right to recover sums paid by collateral sources, and implicitly that it was constitutional to deny his automobile insurer a subrogation right, since the insurer would benefit from the situations in which its insureds were at fault. However, these rationales have no applicability to a health insurer's subrogation rights, which insurer will never benefit from the loss of collateral source recoveries, and thus receives nothing in exchange for the denial of its subrogation rights.

The Third District's opinion conflicts with the rationale of this Court's decision in Underwriters at Lloyds where this Court recognized a right of subrogation by an automobile tortfeasor against a subsequent malpracticing doctor. By the same rationale, the health insurer of a party injured in an automobile accident should be permitted to seek subrogation from an automobile tortfeasor.

Finally, Plaintiffs urge this Court to accept jurisdiction of this case in light of the fact that this

Court has already accepted jurisdiction in two of the district courts of appeals opinions expressly relied on by the Third District.

ARGUMENT

I. A. THE THIRD DISTRICT'S OPINION CONFLICTS WITH KLUGER v. WHITE, 281 So.2d 1 (Fla. 1973) WHICH HOLDS THAT ABOLISHING A RIGHT (HERE SUBROGATION) WITHOUT PROVIDING AN ALTERNATIVE REMEDY VIOLATES FLORIDA'S CONSTITUTIONAL GUARANTEE OF ACCESS TO THE COURTS.

This Court has long recognized that at common law an injured automobile claimant's insurer (whether under a health or automobile policy) had a right to be subrogated to a claimant's recovery. E.g. Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325, 1328 (Fla. 1981); Atlantic Coastline Railways v. Campbell, 104 Fla. 274, 139 So. 886, 888 (1932). The Third District's opinion in this case holds that Section 627.7372, Florida Statutes (1981), is constitutional as applied to group health insurance carriers so as to preclude them seeking subrogation against an automobile tortfeasor and its insurer (A 1).

In Kluger v. White, supra, this Court held that a complete abolition of a prior right of action violates the right of access to courts guaranteed by the Florida Constitution (Art.I, §21) absent either "a reasonable alternative" or "an overpowering public necessity for the abolishment of such right." The Third District's holding

completely abolishes the health insurer's right of subrogation without providing any alternative right. 1/

The loss of the health insurer's traditional common law right of subrogation stands on significantly different footing from that of an automobile insurer's subrogation rights, a fact that the Third District obviously overlooked by its citation of Purdy as support for its decision.

B. THE THIRD DISTRICT'S OPINION CONFLICTS WITH PURDY v. GULF BREEZE ENTERPRISES, INC., 403 So.2d 1325, 1328 (Fla. 1981) IN MISAPPLYING THAT CASE TO HEALTH INSURANCE CARRIERS WHOSE SUBROGATION RIGHTS STAND ON A DIFFERENT FOOTING THAN THE AUTOMOBILE INSURERS CONSIDERED IN PURDY.

Purdy specifically addressed the right of injured plaintiffs (the individual insureds) to recover sums for which they had already been compensated from a collateral source. This Court concluded there was no abolishment of a previous right by the collateral source statute since "these sections merely prevent injured plaintiffs from recovering monies which, equitably speaking, belong to their insurers." 403 So.2d at 1329. Plaintiffs are those insurers, and are now seeking to recover the monies this Court indicated are theirs.

Purdy went on to hold there was no denial of access to courts to automobile insurers through the loss of subrogation

1/ The Defendants in the instant case made no attempt to make any showing of an "overpowering public necessity" for the abolishment of the health insurer's subrogation rights.

rights, since the benefits obtained by the tortfeasors would inure to their insurance carriers. Thus, where an automobile insurer was losing a subrogation right in one case, it would benefit by immunity from the subrogation action of another automobile insurer in a different case. However, the Third District has misapplied this logic to these Plaintiff health insurers who will never benefit from the inability to recover from auto insurers. This Court has jurisdiction based on conflict when a district court of appeal misapplies the law by relying on a decision which involves a situation materially at variance with the one under review. Gibson v. Avis-Rent-a-Car System, Inc., 386 So.2d 520 (Fla. 1980).

C. THE THIRD DISTRICT'S OPINION CONFLICTS WITH UNDERWRITERS AT LLOYDS v. CITY OF LAUDERDALE LAKES, 382 So.2d 702 (Fla. 1980) WHICH RECOGNIZES A CAUSE OF ACTION BY AN AUTOMOBILE TORTFEASOR AGAINST A SUBSEQUENT MALPRACTICING DOCTOR, BY DENYING A HEALTH INSURER A DIRECT RIGHT OF SUBROGATION AGAINST AN AUTOMOBILE TORTFEASOR.

In Underwriters at Lloyds this Court recognized a direct subrogation action by an automobile tortfeasor against a negligent doctor who subsequently aggravated injuries caused by the automobile tortfeasor. Plaintiffs below asked that a direct right of subrogation be recognized in their favor as health insurers against automobile tortfeasors and their insurers, thus providing them with an alternative remedy to replace the subrogation right the Third District held was eliminated by the collateral source statute. The Third District's refusal to recognize such a right, which would

achieve the indistinguishable objective of this Court in Underwriters (to recoup losses that in fairness should be shared with the negligent party, 382 So.2d at 704) conflicts with the well reasoned rationale of Underwriters.

II. THIS COURT SHOULD ACCEPT JURISDICTION TO CONSIDER THE THIRD DISTRICT'S OPINION WHICH DIRECTLY RELIES UPON TWO OTHER DISTRICT COURTS OF APPEALS OPINIONS PREVIOUSLY ACCEPTED BY THIS COURT FOR CONSIDERATION ON THE MERITS.

This Court has repeatedly recognized that even a per curiam citation affirmance which cites as controlling authority a decision that is pending review in this Court, constitutes prima facie conflict and allows this Court to exercise its jurisdiction. Jollie v. State, 405 So.2d 418, 420 (Fla. 1981); see also, e.g., State v. Brown, 475 So.2d 1 (Fla. 1985). Two of the decisions expressly relied upon as controlling authority by the Third District are presently pending before this Court for decision on the merits. Blue Cross & Blue Shield of Florida, Inc. v. Matthews, 473 So.2d 831 (Fla. 1st DCA 1985) is presently pending as Supreme Court Case No. 67,598. Blue Cross & Blue Shield of Florida, Inc. v. Ryder Truck Rental, Inc., 472 So.2d 1373 (Fla. 3d DCA 1985) is presently pending as Supreme Court Case No. 67,591. Those cases present precisely the same issue, and indeed, Matthews considered almost identical arguments.

This Court has accepted jurisdiction of those cases and they are currently set for oral argument before the Court on

June 4, 1986. By its order dated March 24, 1986, this Court has permitted Eckerd to file an amicus brief in those appeals.

Since the decision reached by this Court in Matthews and Ryder will obviously address the rights of Plaintiff health insurers in the pending petition, Plaintiffs urge this Court to exercise its discretion to accept jurisdiction of this action.

CONCLUSION

Based on the foregoing, it is apparent that the Third District's decision in this case conflicts with several decisions of this Court and presents the same issues presented in two cases presently pending before this Court for a decision on the merits. For these reasons, Plaintiffs respectfully request this Court to take jurisdiction of this case.

Respectfully submitted,

CHARLES P. SCHROPP
RAYMOND T. ELLIGETT, JR.
SHACKLEFORD, FARRIOR, STALLINGS & EVANS, Professional Association
Post Office Box 3324
Tampa, Florida 33601
(813) 273-5000
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Michael J. Murphy, Esq., Gaebe & Murphy, 4601 Ponce de Leon Blvd., Suite 100, Coral Gables, Florida 33146; attorneys for Williamson Cadillac Leasing and Fireman's Fund Insurance; Frank R. Gramling, Esq., Fertig & Gramling, 750 Southeast Third Avenue, Suite 200, Ft. Lauderdale, Florida 33316, attorneys for Chicago Insurance Co.; and to Fred L. Fulmer, Esq., James H. Wakefield & Associates, 1230 Southeast Fourth Avenue, Ft. Lauderdale, Florida 33316, attorneys for Lipshaws and Prudential Property & Casualty Insurance Co., this 4th day of April, 1986.

Attorney

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