FILED
SID J. WHITE
JAN 28 1991
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 76,953

UNION CENTRAL LIFE INSURANCE COMPANY,

Petitioner,

-vs-

DANIELLE CARLISLE, ETC., ET AL.,

Respondents.

DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Case Nos. 89-1370; 89-1879

RESPONDENTS' ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

The Respondents, DANIELLE CARLISLE, through her guardians and parents, DEBORAH CARLISLE, individually, as Mother of DANIELLE CARLISLE, and EDWARD CARLISLE, individually, as Father of DANIELLE CARLISLE (hereinafter referred to as "CARLISLE"), file this Answer Brief on the merits to the Petitioner's, UNION CENTRAL LIFE INSURANCE COMPANY (hereinafter referred to as "UNION CENTRAL") Initial Brief on the merits to review the decision of the Fourth District Court of Appeal which certified the following question to the Supreme Court to be a matter of great public importance:

> DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT REFUSED TO PERMIT THE INSURER TO INTERVENE IN THIS CASE?

CARLISLE submits that the Trial Judge did not in fact abuse his discretion when he refused to permit UNION CENTRAL to intervene in this case.

CARLISLE agrees with the Statement of the Case and Facts set forth by UNION CENTRAL insofar as it refers to the medical malpractice action filed by CARLISLE against the Defendant doctors and the NORTH BROWARD HOSPITAL DISTRICT. CARLISLE agrees that $514,000.00 in benefits were paid to CARLISLE under the group policy prior to its cancellation by UNION CENTRAL. The policy of insurance did not, however, contain any clause providing for a right of subrogation or intervention. Despite the fact that an affidavit filed by UNION CENTRAL incorrectly referred to a "right of subrogation" purportedly contained in the policy, the actual policy issued by UNION CENTRAL to CARLISLE did not contain any such

clause (R 639-658). The policy only provided:

> RIGHT OF REFUND
>
> (This provision will apply except where prohibited by law).
>
> When This Provision Applies. The covered person may incur medical or dental charges due to injuries for which benefits are paid by the Policy. The injuries may be caused by the act or omission of another person. If so, the covered person may have a claim against that other person for payment of the medical or dental charges. If recovery under the claim is made, the covered person must repay to the Insurer the recovery made from: (a) the other person; or (b) the other person's insurer. (R 652).

UNION CENTRAL correctly sets forth the allegations contained in its initial Intervenor Complaint, however, it must be pointed out that the Complaint was filed with a supporting affidavit referring to a "right of subrogation and refund" that did not exist in the policy which was in full force and effect at the time. (R 611-625). The affidavit was inaccurate and referred to a policy which was not entered into between CARLISLE and UNION CENTRAL. At the hearing on the Plaintiff's Motion to Dismiss the Intervenor Complaint, (no court reporter was present), CARLISLE brought to the attention of the Trial Judge the fact that the policy which was referenced in the affidavit was not the policy entered into between CARLISLE and UNION CENTRAL. UNION CENTRAL's entire argument was based upon case law which supported a "right of subrogation." In essence, UNION CENTRAL relied on case law which allowed intervention when a policy or contract contained a specific subrogation clause. In fact, no such subrogation clause existed

in the UNION CENTRAL/CARLISLE contract.

UNION CENTRAL also claimed a subrogation right against any recovery the Plaintiff may have in the future from a Florida Legislative Claims Bill. No case law, however, was ever cited in support of such a claim, and in fact, no Legislative Claims Bill had ever been enacted on behalf of or in favor of the CARLISLES.

Without a contractual subrogation right, UNION CENTRAL's claim can only be founded in equity. The Trial Court undoubtably reasoned that no agreement, contract or statute gives UNION CENTRAL any lien rights on the insured tort recovery. Without such a lien right, there is no basis in equity to reach CARLISLE's assets before a judgment is entered against him. The Final Judgment in the CARLISLE's litigation against the tortfeasor will not dispose of UNION CENTRAL's claim, as UNION CENTRAL has the right to sue CARLISLE for the recovery of money paid to it as well as to sue the tortfeasor directly on its own account to recover the money it is paid for CARLISLE's medical care.

It is also obvious that the Trial Court as well as the Fourth District Court of Appeal recognized the potential for severe prejudice to the CARLISLES if the element of insurance coverage was allowed to be presented to the jury in direct conflict with the state's policy on such occurences. In general, the reference to insurance is not favored or allowed for obvious prejudical reasons.

The Fourth District Court of Appeal also noted the potential to open the "floodgates" of intervention by any insurer no matter what the sum involved should it be held that intervention was

mandated, the impact on the judicial system would be disasterous. The floodgates, however, would not be only open to insurers but to any unpaid landlords, doctors, health care providers and any creditor to whom the plaintiffs in litigation owe money to whom he has given letters of protection or in other ways asked to wait until the conclusion of litigation in order to be paid for the services rendered to the plaintiffs. Each and every one of these creditors could then intervene in the action as UNION CENTRAL is trying to do. Under these circumstances, it is easy to see how the delay in disposing of negligence cases when such wholesale intervention is allowed can do nothing but cause a crises in our Court system.

UNION CENTRAL's Statement of the Facts and Case only partially summarizes the Fourth District Court of Appeal opinion, and omits a very important part of that opinion wherein the Fourth District Court of Appeal was referencing the right of refund clause contained within UNION CENTRAL's policy. The Court specifically noted:

> "This clause does not directly grant subrogation rights to the insurer against a third party tortfeasor. Instead merely requires the insured to repay the insurer out of any recovery obtained."

It is critical to note that UNION CENTRAL never before raised as a point on appeal, any fear that its right of reimbursement was in danger of dilusion or elimination. Only after the Fourth District of Appeal issued its opinion, did UNION CENTRAL raise this for the first time on its Motion for Rehearing. (See Appendix to

UNION CENTRAL's Initial Brief A7-A13). Since this point was not raised on appeal, UNION CENTRAL could not raise it on a Motion for Rehearing and the Fourth District Court of Appeal correctly refused to consider this argument.

The Fourth District Court of Appeal correctly summarized that the entitlement to subrogation, equitable or otherwise, does not mandate that a Trial Judge must allow intervention in every case. The Fourth District stated that they would adhere to their conviction that it is a discretionary matter best left to the discretion of the Trial Judge.

CARLISLE agrees with this interpretation of the law and urges this Court to affirm the Fourth District Court of Appeal's opinion and rationale.

SUMMARY OF ARGUMENT

The certified question must be answered in the negative. The Trial Judge did not abuse his discretion when he refused to permit UNION CENTRAL to intervene in this case. UNION CENTRAL does not have a "right of subrogation" but merely has a potential right of refund as set forth in its own policy. UNION CENTRAL's reference to the characterization or attempted allocation of settlement proceeds must not even be considered by this Court as it was never raised as an initial point on appeal.

Intervention is not a matter of right. Had the Legislature intended it to be, they would have drafted a rule of procedure analogous to the Federal rule which grants such a right. On the contrary, in Florida, intervention is left to the sound discretion of the Trial Court Judge. Absent a showing of clear abuse of that discretion, his decision must not be disturbed.

Although the Fourth District Court of Appeal's decision conflicts with Southland Life Ins. Co. v. Abelove, 556 So.2d 805 (Fla. 5th DCA 1990), the Fourth District Court of Appeal was in fact correct in holding that such decisions must be maintained within the sound discretion of the Trial Judge.

The Fourth District Court of Appeal opinion in this matter should be affirmed.

POINT ON REVIEW

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE REFUSED TO PERMIT UNION CENTRAL TO INTERVENE.

ARGUMENT

UNION CENTRAL argues that because it has a right of subrogation as it paid out medical benefits to CARLISLE, it necessarily follows that it also has a right to intervene in CARLISLE's underlying lawsuit. As it did before the Fourth District Court of Appeal, UNION CENTRAL launches into a lengthy discussion of equitable subrogation vs. contractual subrogation which is not necessary for this Court to consider to decide the issue before it. There is, however, one important distinguishing fact between this case and the cases cited by UNION CENTRAL in support of its position. That fact remains that UNION CENTRAL's contract with CARLISLE did not contain any contractual subrogation clause, but merely referred to a potential right to be repaid. Whether this and the fact that UNION CENTRAL paid monies to CARLISLE for medical bills incurred as a result of the tortfeasor's negligence does in fact create a right of subrogation is the not the key issue before this Court. UNION CENTRAL's right of subrogation can only be said to be equitable in nature absent any contractual agreement between CARLISLE and UNION CENTRAL. Since no agreement or statute gives UNION CENTRAL any lien rights on CARLISLE's tort recovery, since there is no lien, there is no basis in equity to reach CARLISLE's assets before a judgment is entered against them. Therefore, UNION CENTRAL has no right or claim to

the assets of the CARLISLES. A denial of intervention does not affect UNION CENTRAL's claim for reimbursement which is the only right afforded to it by its contract with CARLISLE. Their claims remain unaffected by their lack of participation in the medical malpractice lawsuit. Final Judgment will not dispose of UNION CENTRAL's claim as UNION CENTRAL always has the right to pursue reimbursement from CARLISLE by bringing an action against them for its share, if any, of the recovery. UNION CENTRAL appears to be claiming some extraordinary right either by way of an illusory lien or some prejudgment form of garnishment to control money which may be paid to the CARLISLES from a successful conclusion of their medical malpractice action. UNION CENTRAL would have the money go directly from the source of payment from the settlement or a judgment in a medical malpractice action into the hands of UNION CENTRAL thereby bypassing the injured plaintiffs' hands.

The one and only issue this Court must consider is whether or not the Trial Court abused its discretion in denying UNION CENTRAL's Motion to Intervene. This question must be answered in the negative, and for support, we look to this Court's landmark decision in Canakaris v. Canakaris, 382 So.2d 1197 (1980). In that case, this Court set forth a test for review of a Judge's discretionary power:

> "Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the Trial Court. If reasonable men could differ as to the propriety of the action taken by the Trial Court, then it cannot be said that the

> Trial Court abused its discretion." 382 So.2d at 1203.

This Court in Canakaris, supra, recognized the "superior vantage point of the Trial Judge" and cautioned Appellate Courts to apply the "reasonableness" test to determine whether in fact that Trial Judge did abuse his discretion. When the action taken is not unreasonable then there can be no finding of an abuse of discretion. This Court cautioned:

> "The discretionary ruling of the Trial Judge should be disturbed only when his decision fails to satisfy this test of reasonableness." Id.

See also Farish v. Lums, Inc., 267 So.2d 325 (Fla. 1972) wherein this Court stated:

> "The exercise of discretion by a trial judge who sees the parties firsthand and is more fully informed of the situation, is essential to the just and proper application of procedural rules. In the absence of facts showing an abuse of that discretion, the trial court's decision excusing or refusing to excuse, non-compliance with rules . . . must be affirmed . . . it is the duty of the trial court, and not the appellate courts, to make that determination." Id at 327-328.

UNION CENTRAL fails to address the reasonable test and does not provide any factual or legal support evidencing that the Trial Judge was in any way unreasonable in exercising his discretionary power and dismissing the Intervener Complaint.

The rule in and of itself clearly sets forth the discretionary nature of intervention. If the Legislature had intended to mandate intervention for insurance carriers who had paid benefits to

litigants, the rule could have been amended to delete such discretionary language. This was not done, however, and the rule clearly states that:

> "Anyone claiming an interest in pending litigation **may** at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the Court **in its discretion**." Florida Rules of Civil Procedure, Rule 1.230.

Decisions too numerous to note here have upheld the discretionary nature of the Rule of Procedure authorizing intervention, holding that the power to allow intervention "lies within the sound discretion of the Trial Court and will not be disturbed **absent a showing of abuse of discretion**". (Emphasis added). In Interest of J.S., 404 So.2d 1144 (Fla. 5th DCA 1981); Idacon, Inc. v. Hawes, 432 So.2d 759 (Fla. 1st DCA 1983); and Wong v. Wersebe, 365 So.2d 429 (Fla. 3d DCA 1978).

See also Maryland Casualty Company v. Hanson Dredging, Inc., 393 So.2d 595 (Fla. 4th DCA 1981). In that case, Hanson Dredging purchased a bulldozer which was financed by Westinghouse Credit Corporation. The equipment was stolen, and Hanson filed suit against its insurer, Maryland Casualty, to recover for the loss. Westinghouse was not a party to the action. Judgment was entered against Maryland Casualty which subsequently tendered a check in the appropriate amount in payment of the judgment rendered against it. The check was rejected as an inappropriate tender because it was made payable jointly to Hanson as well as Westinghouse pursuant

to a loss payable provision in the insurance policy. Hanson filed a motion to recover the amount of the judgment from USF&G who was the surety on the bond which Maryland Casualty had filed in connection with its original appeal. Maryland Casualty then unsuccessfully attempted to have the interest of Westinghouse included in the judgment. Westinghouse moved to intervene to protect its interests which it claimed to have by virtue of the loss payable clause. The trial court denied Westinghouse's motion to intervene and an appeal followed. The Fourth District Court of Appeal began its consideration of the denial of the motion to intervene with the following statement:

> "Intervention involves an exercise of the chancellor's discretion and his determination will not be disturbed unless error is clearly made to appear. 393 So.2d at 596."

The Court noted that the record before them did not demonstrate an abuse of discretion nor did it demonstrate that injustice would result from denial of the motion to intervene and upheld the trial court's denial of that motion. Wogisch v. Tiger, 193 So.2d 187 (Fla. 4th DCA 1966); and Idacon, Inc. v. Hawes, supra; Hamel v. Seekell, 404 So.2d 1144 (Fla. 5th DCA 1981).

See also Allstate Insurance Company v. Johnson, 483 So.2d 524 (Fla. 5th DCA 1986), in which Allstate attempted to intervene in a wrongful death action in which the estate of the decedent alleged that Allstate's insured negligently shot and killed the decedent. Allstate's intervenor complaint alleged a late notice of claim as well as an intentional act which precluded coverage. The trial

court denied intervention, and the Fifth District Court of Appeal affirmed stating:

> "A trial court does not abuse its discretion when it denies intervention because the would be intervenor seeks to inject new issues into the pending action." 483 So.2d at 525.

It was obviously the Legislature's intent to allow the trial judge to control intervention and in fact gave the trial judge the power to deny participation by intervention even where a right to intervention was shown. For this Court to quash the Fourth District Court of Appeal's decision here would have the effect of rewriting the procedure rule concerning the discretionary nature of intervention. The trial judge, as the Legislature intended, is in the best position to decide which claimant should be allowed to participate in actions which were not initiated by the potential interveners absent an abuse of the trial judge's discretion, and his decisions must not be disturbed.

CARLISLE submits that the Intervenor Complaint clearly would inject new issues into this lawsuit had the intervention been allowed, and the Trial Court, in its discretion, took this into consideration in dismissing the Intervenor's Complaint. Interjection of new issues was clearly raised by CARLISLE at the Trial Court level as well as in the Fourth District. UNION CENTRAL alleges that their claim is not distinct from the original parties and that there are no new issues to be raised, however, the Intervenor Complaint claims a "fiduciary relationship," and duties of diligence, competence and good faith owed to UNION CENTRAL by

their insured and alleged "trustee." Whether or not there is in fact a fiduciary relationship and whether or not the CARLISLES, as Trustees, are acting in good faith and with due diligence certainly are issues which are going to be raised as they are alleged within the Intervenor Complaint. UNION CENTRAL also has claimed an interest in a potential claims bill and whether or not they are entitled to such an interest certainly is an issue which must be litigated. This, too, would inject a new issue into the case and thereby violate the doctrine that when intervention is allowed, no new issues may be raised.

UNION CENTRAL also claims that their interest cannot be adequately protected by any other means, yet cites no support for that contention. As previously stated, UNION CENTRAL is obviously confusing their right of reimbursement with the question of its ability to obtain a judgment against CARLISLE for reimbursement of collateral source medical payments. UNION CENTRAL always has the option of suing its insured directly to obtain reimbursement of its medical payments. A final decision in the medical malpractice does not jeopardize or interfere with UNION CENTRAL's rights to do that. This was obviously considered by the Trial Judge when he dismissed the Intervenor Complaint.

In its opinion, the Fourth District Court of Appeal correctly stated that an entitlement to subrogation, whether it be equitable or contractual, does not mandate that a trial judge must allow intervention in every case. The Fourth District adhered to their conviction that the matter is best left to the discretion of the

trial judge in accordance with the law of this state. The Fourth District also questioned and recognized that to hold to the contrary would in fact lead to the opening of floodgates causing insurers to intervene in all cases of this type. This widespread intervention would lead to the wholesale waste of judicial time, money and economy. Lawsuits will be inundated with new issues and parties, will involve additional, unnecessary trial counsel, and will involve the filing of additional, unnecessary and unwarranted pleadings and other documents. The Fourth District Court of Appeal, in its wisdom, correctly recognized this and attempted to prevent such chaos from occurring. UNION CENTRAL's Brief supports this contention as they have alleged that one of the things that they would do if they were allowed to intervene is submit additional jury instructions and verdict to the jury if, in fact, they participated in this lawsuit. Additionally, this insurance company's involvement and participation in the lawsuit violates the general rule and policy that insurance coverage will not be introduced to the jury for obvious potential prejudical impact to the plaintiff. Grossman v. Beard, 410 So.2d 175 (Fla. 2d DCA 1982); Kreitz v. Thomas, 422 So.2d 1051 (Fla. 4th DCA 1982), and Williams v. Pincombe, 309 So.2d 101 (Fla. 4th DCA 1975).

The Fourth District also acknowledged that their decision conflicted with the decision of the Fifth District in the matter of Southland Life Insurance Company v. Abelove, 556 So.2d 805 (Fla. 5th DCA 1990). In that decision, the Fifth District stated that a further condition to intervention to be taken into consideration

was that the intervenor's interest will not be fully protected by the original plaintiff suit in his own interest. The Fifth District cited for authority in this contention Bay Park Towers Condominium Association, Inc. v. H. J. Ross & Associates, 503 So.2d 1333 (Fla. 3d DCA 1987). In making its decision, the Fourth District Court of Appeal reviewed the decision of Bay Park Towers, and correctly found that no such condition was ever expressed in that opinion. It is respectfully submitted that the Fifth District Court of Appeal was clearly wrong in its decision given the discretionary nature of the rule of procedure. Notwithstanding that fact, however, UNION CENTRAL is unable at this juncture to raise the issue of any fear they may have, whether real or imaginary, that their interests will not be fully protected, and that CARLISLE is in any way trying to do anything which would in fact subvert those interests. This issue was never raised at the Trial Court level, and in fact, was never raised before the Fourth District Court of Appeal in their Initial or Reply Briefs. The law is settled that a contention raised for the first time in a post-trial motion or pleading comes too late to preserve it for appellate review. It logically follows, of course, that a contention which was not made at the trial court level, is not raised before the Fourth District Court of Appeal, but which was raised for the first time in pleadings before the Supreme Court, is not preserved for review. Decisional law is replete with opinions in which losing litigants have attempted to raise so-called "errors of law" without proper preservation of the issue,

and in which those newly raised contentions have been declared waived. See Bernier v. Broward Marine, Inc., 504 So.2d 1379 (Fla. 4th DCA 1987); First American Bank and Trust v. Windjammer Time-Sharing Resort, Inc., 483 So.2d 732 (Fla. 4th DCA) review denied, 494 So.2d 1150 (Fla. 1986); Royal Netherlands Steamship Company v. Quinto de Garcia, 489 So.2d 128 (Fla. 3d DCA) review denied, 496 So.2d 143 (Fla. 1986); Wagner v. Nottingham Assoc., 464 So.2d 166 (Fla. 3d DCA) review denied, 475 So.2d 696 (Fla. 1985).

All of the foregoing decisions were founded on the "concept of finality." That is, all issues should be raised before an Order is entered so that cases are litigated only once rather than over and over again as new contentions occur to the litigants and their counsel. This concept was emphatically reinformed by this Court in its opinion Dober v. Worrell, 401 So.2d 1322 (Fla. 1981). In Dober, supra, this Court stated:

> "It is our view that a procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to amend his initial pleadings to assert matters not previously raised renders a mockery of the "finality" concept in our system of justice. Clearly, this procedure would substantially extend litigation, expand its costs, and if allowed, would emasculate summary judgment procedure."

There is no question that UNION CENTRAL is attempting to interject into this appeal contentions that it fears its rights will not be fully protected, i.e. purported attempt on the part of CARLISLE to subvert or interfere with their right of reimbursement. By way of an appendix, UNION CENTRAL seeks to place before the

Court issues which were never properly raised before the Trial Court or before the Fourth District Court of Appeal, and therefore, these new issues must not be considered.

Finally, UNION CENTRAL incorrectly alleges that the Florida Rule of Civil Procedure is "similar" to the Federal Rule of Civil Procedure, Rule 24 and cites federal cases mandating intervention. On the contrary, the Federal Rule of Civil Procedure governing intervention is distinctly different from the Florida rule in that the federal rule allows an intervention of right which is not discretionary, whereas the Florida rule allows permissive intervention only, based upon the discretion of the Court. There is no such intervention of right created by the Florida Rule of Civil Procedure which can be analogized to the Federal rule. The Federal rule in fact creates an intervention of right when an applicant not only claims an interest relating to the property or transaction which is the subject of the action, but when the applicant is so situated that the disposition of the action may, as a practical matter, "impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." This federal rule does not in any way allow an exercise of discretion on the part of the trial judge, but mandates intervention when the applicant makes a prima facie showing that the disposition of the litigation without intervention would impair its right to protect his interest. Florida's rule, on the other hand, is totally discretionary, and as the Fourth District correctly pointed out in

its opinion in this case, there is no such condition imposed upon a trial court when considering intervention.

CARLISLE submits that the decision of the Fourth District Court of Appeal is correct and must be affirmed.

CONCLUSION

For all of the reasons and authority set forth above, it is respectfully submitted that the certified question should be answered in the negative, that the Trial Court's decision should be affirmed, and that UNION CENTRAL should not be allowed to intervene in this action.

Although the decision in Southland Life Insurance Company v. Abelove, supra, directly conflicts with the Fourth District Court of Appeal's opinion in this case, Abelove, supra, opinion should be rejected. A decision by a trial judge whether or not to allow intervention is discretionary and that decision should not be disturbed absent a showing of abuse of such discretion.

Respectfully submitted,

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