IN THE SUPREME COURT

OF FLORIDA

CASE NO. 76,953

UNION CENTRAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

DANIELLE CARLISLE, ETC., ET AL.

Respondent.

DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Case Nos. 89-1370; 89-1879

PETITIONER'S CONSOLIDATED REPLY BRIEF

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UNION CENTRAL'S RESPONSE TO CARLISLE'S ANSWER BRIEF

On page 1 CARLISLE states that UNION CENTRAL'S policy did not contain a right of subrogation or intervention. ANSWER: This is immaterial. As the District Court recognized the failure to use the magic word "subrogation" is not fatal because the policy requires the insured to repay the insurer from any recovery.

On page 3 CARLISLE argues that there is no agreement, contract or statute which gives UNION CENTRAL any lien rights on the insured tort recovery and without such a lien right there is no basis in equity to reach CARLISLE'S assets before a judgment is entered against him. ANSWER: The District Court correctly held that the policy right of refund provision grants UNION CENTRAL an interest in the subject litigation citing Rebozo v. Royal Indemnity Company, 369 So.2d 644 (Fla. 3d DCA 1979).

On page 3 CARLISLE argues that without a contractual subrogation right UNION CENTRAL'S claim can only be founded in equity and since UNION CENTRAL did not have a lien right there is no basis to reach CARLISLE'S assets before a judgment is entered against him. ANSWER: UNION CENTRAL'S right of refund gives it an interest in the litigation. Rule 1.230 does not limit intervention to those with a right of contractual subrogation but rather affords intervention to anyone claiming an interest in pending litigation. Thus, whether it is contractual or equitable, UNION CENTRAL has the right to intervene. CARLISLE'S argument that UNION CENTRAL does not have a lien and therefore has no basis to reach CARLISLE'S assets before

a judgment is entered against him is immaterial. UNION CENTRAL has a lien based upon the policy right of refund and a right to intervene in order to protect its lien. Assuming arguendo that CARLISLE'S argument of absence of any lien rights is based upon Blue Cross of Florida, Inc. v. O'Donnell, 230 So.2d 706 (Fla. 3d DCA 1970) then O'Donnell must be considered in the light of the later decision of Blue Cross and Blue Shield of Florida v. Matthews, 498 So.2d 421 (Fla. 1986), which held that a health insurer has the right to intervention in order to recover from the tortfeasor the cost of benefits paid to an insured. This clear language gives UNION CENTRAL an interest in the pending malpractice litigation whether it is based on a right of subrogation, a lien, or enforcement of fiduciary duties of its insured.

On page 3 CARLISLE states that the Final Judgment will not dispose of UNION CENTRAL'S claim because UNION CENTRAL has the right to sue CARLISLE for recovery of its money as well as to sue the tortfeasor directly. ANSWER: The insured has a duty not to prejudice the insurer's claim. The policy impliedly requires the insured to seek reimbursements. Assuming that this would not result in the prohibited splitting of causes of action, this would result in another lawsuit either against the insured or the tortfeasor where duplicate evidence would be introduced concerning paid medical bills met in part by the tortfeasor's response that these expenses were included in the prior verdict.

On page 3 CARLISLE argues that severe prejudice to them would occur if the element of insurance coverage was presented to the

jury. ANSWER: The prohibition against introduction of insurance applies only where an insurance company is a named defendant thus creating an atmosphere which might result in an excessive verdict. In this case the insurance company can only recover what it has paid in medical benefits -- no more, no less. There could possibly be no prejudice in this situation.

On page 3 and 4 CARLISLE argues regarding the potential opening up the "floodgates" of intervention. ANSWER: UNION CENTRAL'S answer is stated on pages 17 and 18 of its Initial Brief. UNION CENTRAL should have the right to control its own cause of action and to decide whether to take an active part in intervention.

On page 4 CARLISLE states that UNION CENTRAL'S brief omits one very important part of the opinion i.e., that the policy does not directly grant subrogation rights to the insurer but rather requires the insured to repay the insurer out of any recovery obtained. ANSWER: UNION CENTRAL'S Initial brief on pages 4-5 accurately outlines the opinion of the District Court. Under section (3) it was stated that while UNION CENTRAL'S policy did not contain the magic word "subrogation" the policy contained a right of refund provision. This is precisely the language used in the opinion.

On pages 4-5 and 14-17 CARLISLE states that 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 dilution or elimination until the motion for rehearing. ANSWER:

This is erroneous. The opinion reflects that the insurer "is apprehensive that its rights are not fully protected". It is also erroneous because after the appeal was filed on May 26, 1989 (R.754-755) CARLISLE settled with all the defendants except North Broward Hospital District for the sum of $910,000.00. In their Motion To Approve Partial Settlement dated November 8, 1989, CARLISLE clearly stated that

> "...The overwhelming majority, if not all of the monies received in this settlement are for Danielle Carlisle's pain and suffering and future care after her insurance coverage with Union Central Life Insurance Company expires ...".[1]

After this occurred UNION CENTRAL sought to supplement the record on appeal with this Motion To Approve Partial Settlement. Even though CARLISLE did not object, the Motion To Supplement The Record was denied. Nonetheless during Oral Argument the Court inquired as to the present status of the case and upon being notified of the subsequent events stayed all proceedings in the trial court pending the decision. The stay order is still in effect, the District Court having denied CARLISLE'S Motion To Lift Stay Order. It is therefore incorrect to state that UNION CENTRAL never raised any fear concerning dilution or elimination of its right of reimbursement until after the Court issued its Opinion.

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[1]This is set forth in the Motion for Rehearing. In addition Union Central has simultaneously moved in the District Court to Supplement The Record On Appeal with these additional motions and orders. A copy of this motion is filed with this Reply Brief.

The decisions relied upon by CARLISLE on page 16 are easily distinguishable: Bernier v. Broward Marine, Inc., 504 So.2d 1379 (Fla. 4th DCA 1987) [Parties agreed to non-jury trial on all matters and could not challenge Court's deciding the issue of federal preemption]; First Am. Bank v. Windjammer Time Sharing, 483 So.2d 732, rev.den., 494 So.2d 1150 (Fla. 1986) [Stipulation allowing court to determine whether loans were usurious prevented parties from contending that the court exceeded its authority by modifying the agreed-to figure]; Royal Netherlands S.S. v. Quinto de Garcia, 489 So.2d 128 (Fla. 3d DCA 1986), rev.den., 496 So.2d 143 (Fla. 1986) [Failure to raise issue of choice of law in the trial court precluded consideration on appeal]; Wagner v. Nottingham Associates, 464 So.2d 166 (Fla. 3d DCA 1985), rev.den., 475 So.2d 696 (Fla. 1985) [Failure to raise matter in the trial court precludes appellate review]; Dober v. Worrell, 401 So.2d 1322 (Fla. 1981) [Failure to raise affirmative defense before summary judgment hearing precludes raising the issue for first time on appeal.] The above decisions do not govern because intervenor's complaint was based upon a fear that its right of reimbursement or refund was in danger of being diluted or drastically eliminated unless it was allowed to intervene. CARLISLE'S subsequently filed Motion To Approve Settlement confirmed that fear. These facts were presented to the trial court and the District Court. CARLISLE'S argument concerning "a new issue" is erroneous.

On page 6 CARLISLE states that intervention is not a matter of right but rather left to the sound discretion of the trial

court. ANSWER: This discretion is not without limitations. It is subject to the test of reasonableness. The trial court's discretion cannot be exercised in accordance with whim or caprice of the judge, Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

On pages 7 and 8 CARLISLE argues that UNION CENTRAL'S policy does not contain any contractual subrogation clause but merely referred to a potential right to be repaid. Its right of subrogation can only be equitable. Since UNION CENTRAL does not have any lien rights on CARLISLE'S tort recovery 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 CARLISLE and a denial of intervention does not affect UNION CENTRAL'S claim for reimbursement. ANSWER: UNION CENTRAL has a right of reimbursement. UNION CENTRAL also has the right of equitable subrogation based upon the well established principles of law set forth in Atlantic Coast Line R. Co. v. Campbell, 104 Fla. 274, 139 So. 886 (1922). Even CARLISLE on page 7 admits the existence of equitable subrogation. UNION CENTRAL has an interest in the CARLISLE litigation and therefore is not attempting to reach CARLISLE'S assets before a judgment is entered against them but rather is legally attempting to intervene in order to obtain reimbursement of its own monies paid. These are not CARLISLE'S assets -- they are UNION CENTRAL'S funds. Furthermore, any reference to CARLISLE'S assets before a judgment is entered against them presupposes CARLISLE'S failure to reimburse UNION CENTRAL for medical benefits paid after receiving a settlement and/or a

sizeable jury verdict. This is the very scenario UNION CENTRAL is attempting to avoid -- having to chase CARLISLE for reimbursement after they have been paid by the tortfeasors.

On page 8 CARLISLE argues that a Final Judgment will not dispose of UNION CENTRAL'S claim as UNION CENTRAL always has the right to pursue reimbursement from CARLISLE for its share, if any, of the recovery. ANSWER: This is exactly what UNION CENTRAL seeks to avoid i.e., CARLISLE'S full recovery from the tortfeasor including medical expenses, and/or a failure to present all claims during the lawsuit which could result in waiver or res judicata, and/or a full recovery followed by failure of CARLISLE to reimburse UNION CENTRAL resulting in another lawsuit by UNION CENTRAL against CARLISLE where the latter would unfairly contend that the first law suit did not result in reimbursement of these damages.

On page 8 CARLISLE argues that 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 CARLISLE from a successful conclusion of the malpractice action. UNION CENTRAL would have the money go directly from the source of payment from the settlement or a judgment in the malpractice action into the hands of UNION CENTRAL thereby bypassing the injured plaintiff's hands. ANSWER: The policy provides for reimbursement. Therefore, UNION CENTRAL has a direct right of repayment either from CARLISLE or from the tortfeasor. The doctrine of equitable subrogation also provides for reimbursement from the tortfeasor. Either way, UNION CENTRAL has a right to

intervene to protect its interests which obviously are in dire need of protection and direct payment of its claim would avoid unnecessary duplication of litigation.

On pages 8 and 9 CARLISLE states that UNION CENTRAL fails to address the reasonable test and does not provide any factual or legal support evidencing that the trial judge acted unreasonably. ANSWER: UNION CENTRAL'S brief clearly points out the abuse of discretion. In addition, CARLISLE'S Motion To Approve Settlement which attempted allocation of settlement funds away from UNION CENTRAL'S right of reimbursement effectively dissipates any doubt concerning its need to intervene to protect its interests and the trial court's clear abuse of discretion in denying intervention. Furthermore, the reasons set forth in Southland Life Ins. Co. v. Abelove, 556 So.2d 805 (Fla. 5th DCA 1990) apply with equal force. As admitted by CARLISLE on page 6, the decision conflicts with Abelove which UNION CENTRAL submits should be followed.

On pages 10-12 CARLISLE cites numerous cases concerning the discretionary power to allow intervention: These are easily distinguishable: In Interest of J.S.,404 So.2d 1144 (Fla. 5th DCA 1981) involved a grandmother's right to participate in a grandchild's dependency proceedings. Idacon Inc. v. Hawes, 432 So.2d 759 (Fla. 1st DCA 1983) involved a bank with unperfected security interest untimely attempting to intervene several months after final judgment in foreclosure sale and after judicial sale. Wong v. Von Wersebe, 365 So.2d 429 (Fla. 3d DCA 1978) involved untimely attempted intervention to vacate peremptory writ of mandamus 31

days after writ had been entered. Maryland Casualty Company v. Hanson Dredging, Inc., 393 So.2d 595 (Fla. 4th DCA 1981) involved Westinghouse's attempt to intervene to protect its security interest in the stolen chattel after the entry of final judgment and after Maryland Casualty had unsuccessfully attempted by motion for rehearing to have Westinghouse's interest included in the judgment. Wogisch v. Tiger, 193 So.2d 187 (Fla. 4th DCA 1966) supports UNION CENTRAL'S argument. In Wogisch the trial court granted the City of Hollywood leave to intervene in a suit for injunction which sought to eliminate appellant's hog farm operation. In Allstate Insurance Company v. Johnson, 483 So.2d 524 (Fla. 5th DCA 1986) Allstate attempted to intervene in a wrongful death action seeking a determination of prejudice based on alleged late filing of notice of claim and the policy exclusion of intentional acts. These were new issues separate and apart from the wrongful death action which alleged that Allstate's insured negligently shot and killed the decedent. UNION CENTRAL'S Intervenor Complaint does not inject new issues in the lawsuit.

On page 12 CARLISLE argues that a reversal of the District Court's decision would have the effect of rewriting the procedural rule concerning the discretionary nature of intervention. ANSWER: This is erroneous. The certified question does not seek a rule change but rather an answer of whether the court abused its discretion because UNION CENTRAL has a right of reimbursement and a direct interest in the lawsuit. A reversal would simply follow the well established rule that the trial judge's discretion is not

unbridled and is always subject to review for possible reversal based upon abuse of discretion.

On pages 12 and 13 CARLISLE argues that the intervenor complaint would inject new issues into the lawsuit based upon the intervenor's complaint which claims a fiduciary relationship, duties of diligence, competence and good faith and, alleged trustee. ANSWER: No new issue will be interjected in the lawsuit. This fiduciary relationship and the duties are owed to UNION CENTRAL by CARLISLE and only come into play between UNION CENTRAL and CARLISLE in regard to recovery of paid medical benefits. They would not become an issue in the litigation against the tortfeasor. On the contrary, it is this relationship which entitles UNION CENTRAL to intervene. UNION CENTRAL'S claim is not distinct from the original parties -- UNION CENTRAL and CARLISLE seek reimbursement of medical expenses from the tortfeasor.

On page 13 CARLISLE argues that UNION CENTRAL confuses its right of reimbursement with the question of ability to obtain a judgment against CARLISLE for reimbursement. UNION CENTRAL always has the option of suing its insured directly to obtain reimbursement. ANSWER: UNION CENTRAL should not be forced to file suit against CARLISLE to obtain rightful reimbursement. Intervention is the answer. In fact, CARLISLE'S suggestion that UNION CENTRAL could always sue them to obtain reimbursement demonstrates beyond any doubt that UNION CENTRAL needs to protect its own interest now by being allowed to intervene rather than being forced to sit on the sidelines while its right of reimbursement is in danger of

dilution or elimination and then be forced to sue CARLISLE later on.

On pages 13 and 14 CARLISLE argues that allowing intervention will open floodgates causing insurers to intervene in all cases resulting in wholesale waste of judicial time, money and economy. ANSWER: The insurer should have the right to intervene in the lawsuit and decide how active an intervention to pursue. If an insurer is required to pursue its insured in a separate lawsuit a real waste of judicial time and money will occur.

On page 14 CARLISLE relies upon the principle of law that insurance coverage should not be introduced into evidence because of the obvious potential prejudicial impact to plaintiff citing Grossman v. Beard, 410 So.2d 175 (Fla. 2d DCA 1982) [Introduction of evidence of medical bills paid under Workers' Compensation was reversible error]. UNION CENTRAL seeks to intervene to insure that the verdict correctly reflects a return of those benefits; Kreitz v. Thomas, 422 So.2d 1051 (Fla. 4th DCA 1982) [Court erroneously allowed introduction of evidence of Workers' Compensation benefits as a collateral source contrary to §627.7372(3) and in violation of a court order]. UNION CENTRAL'S intervention will not influence the jury to reduce the damages but rather the amount of paid medical benefits will be utilized as a springboard to determine the amount of future damages; Williams v. Pincombe, 309 So.2d 10 (Fla. 4th DCA 1975) [Introduction of welfare benefits for the purpose of impeaching testimony regarding motivation to return to work was improper]. UNION CENTRAL does not seek to intervene to prejudice

or limit CARLISLE'S amount of recovery.

Lastly, on pages 17 and 18 CARLISLE argues that the federal cases cited by UNION CENTRAL are not relevant because the federal rule allows intervention as a matter of right and the Florida rule allows permissive intervention based upon the discretion of the trial court. ANSWER: Regardless of the differences in the rules, the Federal decisions cited by UNION CENTRAL dealing with abuse of discretion apply with equal force to the case at bar.

UNION CENTRAL'S RESPONSE TO BRIEF OF AMICUS CURIAE:

AFTL argues that the Final Judgment will not dispose of UNION CENTRAL'S claim citing the following three decisions, none of which support AFTL'S argument: Industriales Nicaraguenses v. Switzerland General Ins. Corp., 443 So.2d 1062 (Fla. 3d DCA 1984) held that plaintiff insured did not impair the subrogation rights of defendant insurer by failing to file suit against a third party tortfeasor because failure to file suit without more was not an affirmative act of the insured which constituted an impairment of the subrogation rights and the insurer denied coverage, did not request the insured to file suit and therefore asserted no subrogation rights which were capable of being impaired. The distinction between Industriales and the present case is obvious.

Fireman's Fund Ins. Co. v. Rojas, 409 So.2d 1166 (Fla. 3d DCA 1982) merely held that the statute of limitations begins to run on an insurer's indemnity claim against an uninsured motorist tortfea-

sor when the indemnity liability is satisfied, not when the accident occurred. The decision does not establish whether the insureds had filed suit against the tortfeasor. Again, the distinction between Rojas and the present case is obvious.

In Blue Cross & Blue Shield of Fla., Inc. v. Matthews, supra this Court quashed an order denying intervention and held that §627.7372 did not bar the subrogation rights of the health insurer to recover from the tortfeasor the cost of benefits paid to an insured. Matthews supports UNION CENTRAL'S argument. None of the cases cited by the AFTL allows two separate lawsuits to be filed by the injured plaintiff and the health insurer against the tortfeasor to recover the same items of medical expenses. Therefore, denial of intervention will effect UNION CENTRAL'S claim for reimbursement or subrogation.

Contrary to AFTL'S argument UNION CENTRAL is not seeking some extraordinary right by lien or some form of pre-judgment garnishment to control the fund of money. Nor is UNION CENTRAL'S real dispute only with how it actually collects on the claim. UNION CENTRAL'S argument is based upon the premise that it is entitled to protect its own right of reimbursement and it should be allowed to intervene to introduce paid medical benefits and assist in preparation of jury instructions and verdict form. UNION CENTRAL'S real dispute concerns both the claim for reimbursement and collection. Neither concern is illegal nor illogical.

AFTL states that UNION CENTRAL confuses the question of its ability to obtain a judgment against its insured for reimbursement

with the separate question of its ability to satisfy the judgment. UNION CENTRAL would not be forced to sue its insured and obtain satisfaction of a judgment if it were allowed to intervene. AFTL'S argument concerning absence of a lien and no basis in equity to reach a debtor's assets before a judgment is entered or even injunctive relief or garnishment really supports UNION CENTRAL'S argument that its right of reimbursement is in danger of elimination or great reduction unless it is allowed to intervene. It also presupposes a failure of its insured to honor its reimbursement duties.

AFTL'S argument that the victim's negligence case would be turned into an omnibus action encompassing all claims of unpaid landlords et cetera and turn the trial courts into collection agencies or quasi bankruptcy courts is the epitome of a spurious argument. None of them are entitled to reimbursement of medical benefits. Intervention will not delay litigation. Requiring a health insurer to file its own lawsuit would result in unnecessary duplicate litigation and a backlog in our court system.

The answer to argument concerning rewriting the rule is quite simple. Neither the Certified Question nor UNION CENTRAL asks this Court to rewrite the rule. Rather the District Court seeks a determination of whether the trial court abused his discretion when he denied intervention and UNION CENTRAL submits that the trial court **did** abuse his discretion. The end result of AFTL'S argument would be to deny any right of appeal from a trial court's decision either allowing or disallowing intervention. This is a constitu-

tional right which cannot be disposed of in this manner.

Lastly, AFTL'S rather flippant statement that "the Fifth District has gotten it all wrong in Abelove " is an ineffectual attempt to distinguish Abelove which is correct and should control.

CONCLUSION

The Certified Question to be answered in the affirmative and the direct conflict should be resolved by an adoption of the Abelove decision as controlling law in the State of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 26th day of February, 1991, to all counsel on attached mailing list.

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CARLISLE v. HUNTSINGER, et al.
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