SUPREME COURT OF FLORIDA

RONNIE WOODALL, et ux.,

Petitioners,

vs.

TRAVELERS INDEMNITY COMPANY,

Respondent.
_____/

CASE NO: 89,052

District Court of Appeal
1st District: 95-3293

BRIEF OF THE AMICUS CURIAE, THE ACADEMY OF FLORIDA TRIAL LAWYERS

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL FIRST DISTRICT

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INTRODUCTION

This brief is filed on behalf of the Academy of Florida Trial Lawyers as Amicus Curiae, supporting the position of the Petitioners in this proceeding. The Petitioners will be referred to as the WOODALLS, the Respondent will be referred to as TRAVELERS, and the Academy of Florida Trial Lawyers will be referred to as AFTL, or as they stand before this Court, respectively, for the sake of brevity. Unless otherwise indicated, emphasis has been supplied by counsel.

STATEMENT OF THE CASE AND FACTS

The Academy of Florida Trial Lawyers (AFTL), Amicus Curiae, accepts Petitioners' Statement of the Case and Facts.

POINT ON APPEAL

DOES THE HOLDING IN KILBREATH APPLY WHEN *AN* UNINSURED/UNDERINSURED MOTORIST POLICY CONTAINS A NO ACTION/EXHAUSTION CLAUSE PROVIDING THAT PAYMENT WILL BE MADE ONLY AFTER THE LIMITS OF LIABILITY HAVE BEEN USED UP UNDER ALL THE APPLICABLE BODILY INJURY LIABILITY POLICIES?

SUMMARY OF ARGUMENT

In answering the question certified by the First District Court of Appeal, this Court must keep in mind that the uninsured/underinsured motorist law was enacted for the benefit and protection of injured persons and not for the benefit of the insurance companies or motorists who inflict the damage. Brown v. Progressive Mutual Insurance company, 249 So.2d 429 (Fla. 1971). This Court must also keep in mind that in construing the language of an insurance policy, it must apply the construction most favorable to the insured. Where two interpretations may fairly be given to the language of an insurance policy, the one providing greater coverage will be given. O'Dwyer v. Manchester Insurance Company, 303 So.2d **347** (Fla. 3d **DCA 1974).**

Uninsured/underinsured motorist coverage is a benefit that the Petitioners, the WOODALLS, consciously elected to purchase to protect themselves and others for the injuries suffered at the hands of an uninsured or underinsured negligent tortfeasor.

The insurer, TRAVELERS, chose to include an express provision in its policy that stated it would only make payment under the underinsured motorist coverage **after** the limits of liability are use up under all applicable bodily injury liability bonds or policies. Construing this language in the light most favorable to the WOODALLS, the insureds, their cause of action for underinsured motorist benefits did not accrue until the tortfeasor's liability limits of $10,000 were tendered to them, on or about September 9, 1993. The action **was** then timely filed against TRAVELERS in

December, 1993. To adopt the position of TRAVELERS would be, in essence, to hold that the WOODALLS lost their right of action against TRAVELERS before it arose! This is an untenable and inequitable position, particularly in light of the intended purpose of the Legislature in enacting the uninsured motorist law.

AFTL strongly urges this Court to answer the certified question by holding that Kilbreath does **not** apply under circumstances such as this case, when the policy contains a no action/exhaustion clasue providing that payment will be made only after the limits of liability have been used up under all the applicable bodily injury liability policies. Under these circumstances, the cause of action against the underinsured motorist carrier does not accrue until **the** contractual condition precedent is met.

ARGUMENT

THE COURT SHOULD ANSWER THE CERTIFIED QUESTION AS FOLLOWS:

WHEN *AN* UNINSURED/UNDERINSURED MOTORIST POLICY CONTAINS A NO ACTION/EXHAUSTION CLAUSE PROVIDING THAT PAYMENT WILL BE MADE ONLY AFTER THE LIMITS OF LIABILITY HAVE BEEN USED UP UNDER ALL THE APPLICABLE BODILY INJURY LIABILITY POLICIES, A CAUSE OF ACTION UNDER THE UM POLICY DOES NOT ACCRUE UNTIL THE LIABILITY POLICY LIMITS HAVE BEEN TENDERED TO THE PLAINTIFF. THEREFORE, THE HOLDING IN KILBREATH DOES NOT APPLY UNDER THESE CIRCUMSTANCES.

In State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So.2d 632 (Fla. 1982), this Court held that, in an action under an uninsured motorist insurance policy, the statute of limitations begins to run as of the date of the accident. The subject case involves underinsured, not uninsured motorist coverage.

The recent decision of this Court in State Farm Mutual Automobile Insurance Company v. Lee, 678 So.2d 818 (Fla. 1996) held that the statute of limitations for an action based on an insurer's failure to pay personal injury protection (PIP) benefits begins to run when the insurer breaches its obligation to pay, not when the accident occurs. The court in Lee clearly recognized the proposition espoused by AFTL herein, to wit: a cause of action cannot be said to have accrued until an action may be brought. In that case, pursuant to Fla. Stat. Sec. 627.736 (4)(b), State Farm had no contractual obligation to pay PIP benefits until 30 days after receipt of the PIP claim . Once the 30 days elapsed, State Farm had effectively breached their contract. At *the* time of the accident, and before any PIP benefits were due, the Lees could not

have brought an action against State Farm for PIP benefits, and therefore the statute of limitations could not have begun to run. It was only upon State Farm's denial of the actual PIP claim that the limitations period began running. Therefore, the statute of limitations for an action based on the insurer's failure to pay PIP benefits could not begin to run from the date of the accident.

Interestingly enough, the Lee case came before this Court based upon a conflict between the Second District Court of Appeals in Fladd v. Fortune Insurance Company, 530 So.2d 388 (Fla. 2d DCA 1988) and the Third District's decision in Lee. This Court disapproved the Fladd decision in holding that the statute does not begin to run form the date of the accident. The Second District, just **like** TRAVELERS herein, had relied upon Kilbreath in asserting its position that the statute began to run on the date of the accident. In rejecting the Fladd decision, this Court recognized that when a claim is in contract for failure to pay the contractual obligation for personal injuries sustained, it does not accrue on the date of the accident. Just as in Lee, in this case, at the time of the accident, the insurer owed no contractual obligation to pay the WOODALLS any benefits, and therefore, it had not yet breached any contractual obligation.

The circumstances of this case are also analagous to those presented to this Court, also by way of certified question, in Blanchard v. State Farm Mutual Automobile Insurance Company, 575 So.2d 1289 (Fla. 1991). In Blanchard, this Court was asked by the United States Court of Appeals for the Eleventh Circuit whether an

insured's claim against an uninsured motorist carrier for bad fait failure to settle an uninsured motorist claim accrues before th conclusion of the underlying litigation for the contractual uninsured motorist insurance benefits.

This Court answered the certified [illegible] stated:

> "If an uninsured motorist is not liable to the insured for damages arising from an accident, then the insurer has not acted in bad faith in refusing to settle the claim. Thus, an insured's underlying first-party action for insurance benefits against the insurer necessarily must be resolved favorably to the insured before the cause of action for bad faith in settlement negotiations can accrue. It follows that an insured's claim against an uninsured motorist carrier for failing to settle the claim in good faith does not accrue before the conclusion of the underlying litigation for the contractual uninsured motorist benefits."

Blanchard, supra, 575 So.2d at 1291.

See also, Michigan Millers Mutual Insurance Company v. Bourke, 581 So. 2d 1368 (Fla. 2d DCA 1991), holding that a bad faith claim arising out of a dispute over uninsured motorist benefits could not proceed before termination of the underlying contractual litigation wherein liability, and the extent of the insured's damages are determined. The claim simply does not exist until liability and the extent of damages are determined.

By the same token, by the policy language itself, if the underinsured motorist carrier is not required to make payment until after the limits of liability have been used up under the tortfeasor's policy or policies, it follows that an insured's claim

against said carrier cannot accrue before the liability limits have been tendered to the injured party. It must first be determined how much, if any, liability payments have been made, before a determination could be made that payment under the underinsured motorist policy is required. Absent a determination of the extent of the Plaintiff/insured's damages and liability on the part of the underinsured tortfeasor, a cause of action cannot exist fo runderinsured motorist coverage under the terms of TRAVELER's policy. A resolution of some kind in favor of the insured is a prerequisite, just as in Blanchard.

Furthermore, by the policy language itself, it does not apply to uninsured motorist coverage, only to underinsured motorist coverage. In a strict uninsured motorist claim, ther would not even be a liability carrier involved, to the no action/exhaution clause of the policy would not even kick in. This is an additional reason why the holding in Kilbreath must not be found to apply in an underinsured situation.

A cause of action does not arise until the existence of redressable harm has been established. In this case, the WOODALLS did not suffer redressable harm until it received the limits of the liability policy from the tortfeasor, because, until. then, there ws only a possibility that TRAVELERS woudl be liable for payemnt udner the underinsured motorist insurance policy. there can be no dispute that a cause of action accrues when the last element neceswsary to cosntitute the cause of action occurs. Fla. STat. Sec. 95.031(1). Under the insurance contrac,t prepared by TRAVELERS, the WOODALLS cause of action did not "accrue" udner the statute of limitations until they were tendered the tortfeasor's

liability limits.

A necessary element of insurance is the distribution of risk. It has been defined as contractual security against possible anticipated loss with the shifting of risk from one party to another. Southeast. Title and Insurance company v. Collins, 226 So.2d 247 (Fla. 4th DCA 1969). A private concern, TRAVELERS, was paid a premium *to* assume certain risks. It should not be allowed to shift the risk back to the insureds.

Consumers often feel helpless in waging their seemingly never-ending battle with insurance companies to whom they regularly and faithfully pay their premiums but who repeatedly resist payment of claims based upon what the public perceives as mere technicalities. Uninsured motorist coverage, while not mandatory, frequently is carried by Florida motorists in recognition *of the* numerous uninsured and underinsured drivers traveling the public highways of this State.

Uninsured motorist coverage represents "the only meaningful protection available to Floridians who daily are subjected to misguided missiles on the highways of this state..." Ferrigno v. Progressive American Insurance Company, 426 So.2d 1218, 1219 (Fla. 4th DCA 1983). For this reason, uninsured and underinsured motorist benefits should be liberally construed to provide the broadest possible protection to Florida motorists. Salas v. Liberty Mutual Fire Insurance Company, 272 So.2d 1 (Fla. 1972). In interpreting the statute and the insurance contract, this Court should acknowledge that the uninsured motorist law was enacted for the benefit and protection of injured persons and not for the benefit of the insurance companies or motorists who inflict the

damage. Brown v. Progressive Mutual Insurance Company, 249 So.2d 429 (Fla. 1971). With these principles in mind, Courts should remain vigilant to protect Floridians from insurance company attempts to limit the applicability of benefits specifically purchased by the insureds.

Uninsured and underinsured motorist coverage is designed to compensate the insured for a deficiency in the tortfeasor's personal liability insurance coverage. Dewberry v. Auto-Owners Insurance Company, 363 So.2d 1077 (Fla. 1978). Adopting the position of Petitioners and AFTL would meet the purposes of compensating insureds for deficiencies in tortfeasors' liability coverage. If the position of the Respondents were adopted, TRAVELERS would be allowed to benefit from accepting premiums for insurance coverage and yet still leave its insureds uncompensated for their damages. This result would protect the insurance carrier when the legislative intent was designed to protect persons injured by underinsured motorists.

Furthermore, if the position *of* the Respondents were adopted, then the statute of limitations would run from the date of the accident, regardless of the policy language. This Court would be essentially authorizing insurance companies who provide underinsured motorist coverage to include no action/exhaustion clauses in their policies to provide a false sense of security to injured insureds. If the liability carriers for the tortfeasors don't settle, and the cases have to be tried, the statute of limitations would likely run during the pendency of the case against the tortfeasor. This would discourage liability carriers from settling cases. The pretrial settlement of a lawsuit is

generally favored because it saves scarce judicial resources. The uninsured motorist carriers could then wait until the statute of limitations runs from the date of the accident until it denies responsibility for payment. This would result in consumers paying a premium for something they can't use! This is an inequitable position, and clearly inconsistent with the purposes of underinsured motorist coverage.

CONCLUSION

The certified question should be answered in the negative, and the decision of the First District Court of **Appeal** should be quashed, and the case remanded with directions to reinstate the claim of the Petitioners.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Richard J. Delmond, Esquire, 1927 N.W. 13th Street, Gainesville, Florida 32609, Robert J. Denson, Esquire, Santa Fe Community College, Office of the President, 3000 N.W. 83rd Street, Gainesville, Florida 32606-6200, and Deborah C. Drylie, Esquire, Post Office Box 1526, Gainesville, Florida, 32602, on this 4th day of November, 1996.

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