IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,052

RONNIE WOODALL, et ux.,

Petitioners,

-vs.-

TRAVELERS INDEMNITY COMPANY,

Respondent.

ON QUESTION CERTIFIED FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

PETITIONERS' REPLY BRIEF

RICHARD J. DELMOND
9211 N.W. 13th Place
Gainesville, FL 32606
(352) 376-1100

ROBERT J. DENSON
Santa Fe Community College
Office of the President
3000 **N.W. 83rd Street**
Gainesville, FL 32606-6200
(352) **395-5179**

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases: Page Number

Table of Statutes:

PRELIMINARY STATEMENT

Reference to the Record on Appeal will be denoted as (R - followed by the appropriate page number). Reference to the Transcripts of hearings will be denoted by (R - trans. followed by the appropriate page number).

The Plaintiffs/Appellants, Ronnie and Judith Woodall, will be referred to as "the Woodalls"; Defendant/Appellee, The Travelers Indemnity Company, will be referred to as "Travelers".

STATEMENT OF THE CASE AND THE FACTS

Travelers states that the Woodalls made errors in their Statement of the Case and the Facts. The Woodalls made no errors in their Statement of the Case and the Facts.

First, Travelers states that the Record on Appeal contains no information as to whether a claim was filed against the tortfeasor. However, in the middle paragraph 6 of its Motion to Dismiss (R - 19), dated February 21, 1994, acknowledges the Woodalls claim against the tortfeasor. The claim is also referenced in the letter to Travelers requesting Travelers' approval of the settlement, dated September 13, 1993, and attached as Exhibit "B" (R - 111) to an Affidavit (R - 106). Travelers refers to interrogatories, but the Record on Appeal contains no interrogatories. Since the accident occurred on December 15, 1987, the four-year statute of limitations would have run against the tortfeasor on December 15, 1991. A copy of the $10,000 check tendered bythetortfeasor's liability insurer, dated September 2, 1993, and received on September 9, 1993, is attached as Exhibit "A" (R - 110) to an Affidavit (R - 106). There would have been no $10,000 settlement check issued on September 2, 1993, almost two years after the time the statute of limitations would have run against the tortfeasor, had suit not been filed against the tortfeasor to toll the running of the statute of limitations.

Second, Travelers states that the Woodalls' fact statement that Travelers made no objection to the settlement goes beyond the scope of the Record on Appeal. Travelers is in error. This fact

is in the Record on Appeal in the letter from Travelers to the Woodalls' attorney, dated November 12, 1992, which was sent by Travelers in response to the Woodalls request that Travelers approve the settlement, attached as Exhibit "C" (R - 112) to an Affidavit (R -106). In its letter, Travelers did not object to or refuse to approve the settlement.

Third, Travelers states that the Woodalls, at the time of filing of the Complaint and Amended Complaint (R -1 and R - 9), did not have a copy of the insurance policy, and therefore could not have acted in reliance on the specific language of the policy. Travelers statement is in error. The Complaint and Amended Complaint alleged that the "complete" policy was in the possession of Travelers. The Complaint and Amended Complaint did not state that the Woodalls did not have a copy of the policy, but rather, reflected the fact that the Woodalls were unsure as to whether their copy of the policy was "complete," i.e. whether they had copies of all changes and endorsements to the policy.

SUMMARY OF ARGUMENT

Under the reasoning set forth by this Court in Hassen v. State Farm Mutual Automobile Insurance Company, 674 So.2d 106 (Fla. 1996), the relevant provisions of §627.727(6), Fla. Stat. (1982), are substantive, not procedural. The enactment of §627.727(6) substantively altered the law of Florida as it must be applied to underinsured motorist claims. As a part of the substantive law, §627.727(6) defines the events which create an underinsured motorist claim. Under the substantive provisions of §627.727(6), the Woodalls did not have an ascertainable underinsured motorist claim which could have accrued until the requirements of §627.727(6) were satisfied.

Travelers' "no action/exhaustion clause," which mirrored the relevant provisions of §627.727(6), provided that the woodalls could not bring an action against Travelers until all liability coverage had been used up, and that until such time as all liability coverage had been used up, Travelers had no obligation to make payment to the Woodalls. The "no action/exhaustion clause" was drafted by Travelers and imposed on the Woodalls in the form of an adhesion contract. The "no action/exhaustion clause" is consistent with the Legislative intent evinced by §627.727(6). The policy language was clear and unambiguous, and should be enforced against Travelers has having contractually tolled the Woodalls cause of action from accruing until Travelers had an obligation to make payment under its insurance contract.

ARGUMENT

ISSUE: WHETHER THE HOLDING IN KILBREATH APPLIES WHEN A PLAINTIFF'S UM 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 APPLICABLE BODILY INJURY LIABILITY POLICIES?

The First District Court of Appeal certified to this Court as a matter of great public importance, the question set forth above. At page 17 of its Brief on the Merits, Travelers suggests that the Woodalls labeled the policy language in issue as a "no action/ exhaustion clause", when in fact the term "no action/exhaustion clause" was selected by the First District Court of Appeal as the appropriate term to describe the policy language in issue.

A. Section 627.727(b) is Substantive, Not Procedural

Travelers states at page 8 of its Brief that the statutory language of §627.727(6) establishes a "procedure" for settlement of the injured person's claim. The statutory language of §627.727(6) is substantive, not procedural. By enactment of Chapter 77-468, Section 30, Laws of Florida (1977), which became effective on October 1, 1977, as subsection (6) to §627.727, the Legislature created new substantive law which changed the recognized law of Florida. This enactment altered substantive rights and created new obligations to be imposed on injured persons and their uninsured motorist insurers. The statute provided that the UM insurer was required to waive its subrogation rights against the tortfeasor and the liability insurer and authorize the execution of a full release,

within 30 days of the written notice of the settlement offer from the injured person, and if it failed to do so, the injured person then had the right to bring suit jointly against the UM insurer and the tortfeasor. The statute further required that the tortfeasor's liability insurance coverage be exhausted before any award could be entered against the UM insurer. The statute also made any award against the tortfeasor binding and conclusive upon the both the UM insurer and the injured person. These 1977 changes clearly altered the landscape of uninsured motorist law and must be considered substantive under the reasoning set forth by this Court in Hassen v. State Farm Mutual Automobile Insurance Company, 674 So.2d 106 (Fla. 1996), an action in which this Court examined the 1992 amendment to §627.727(6). Travelers statement that §627.727(6) is procedural, fails to account for this Court's recent decision in Hassen.

By enactment of Chapter 82-243, Section 813, Laws of Florida (1982), the Legislature amended §627.727(6), substituting the term underinsured for uninsured throughout Subsection (6), to clarify that the substantive law should be applied only to underinsured motorist claims, and not to uninsured motorist claims. The amendment defined the events which were required to create an underinsured motorist claim. The Travelers insurance policy successfully mirrors the 1982 amendment in its "no action/exhaustion clause."

The accident in State Farm Mutual Automobile Insurance Co. v. Kilbreath, 419 So.2d 362 (Fla. 1982), occurred in 1972, prior to the 1977 enactment of §627.727(6) and the 1982 amendment. The 1977

enactment created new substantive law which could not have been retroactively applied by this Court in Kilbreath. As stated by this Court in Hassen at 108:

> It is a well established rule of statutory construction that, in the absence of an express legislative statement to the contrary, an enactment that affects substantive rights or creates newobligations is presumed to apply prospectively. (Emphasis supplied.)

In Kilbreath, this Court accurately found that a cause of action for an "uninsured/underinsured" motorist claim accrued on the date of the accident. However, one month after the decision in Kilbreath, §627.727(6), Fla. Stat. (1977), became the new substantive law of Florida. The Legislature amended §627.727(6) in 1982 and clarified that the new substantive law was to be applied only to underinsured motorist claims. Section 627.727(6), Fla. Stat. (1982), altered the playing field on which the rights and obligations of injured persons and their underinsured motorist insurers must be examined by this court.

As part of the substantive law found in §627.727(6), Fla. Stat. (1982), the Legislature mandated that an underinsured motorist claim is created when the injured person agrees to settle a claim with the liability insurer for the limits of liability and such settlement would not fully satisfy the claim for personal injuries. In Wardrop v. Government Employment Insurance Company, 567 So.2d 1012 (Fla. 3d DCA 1990), rev. den., 581 So.2d 168 (Fla. 1991), the Court examined §627.727(6) to determine whether joinder of both the UM insurer and the tortfeasor was mandatory or permissive in an action against the UM insurer after the tortfeasor's liability

insurer offered to settle for its policy limits and the UM insurer refused to approve the settlement. The Court acknowledged that in this situation, §627.727(6) gave rise to the creation of an underinsured motorist claim:

> Section 627.727 is applicable in situations, such as in the present case, where the liability insurer offers the injured person its liability limits. If the settlement would create an underinsured motorist claim, the injured person is required to submit the settlement offer to the underinsured motorist insurer for approval. (Emphasis supplied.)

Id. at 1013. In Wardrop, the Court held that joinder was mandatory. *Sub judice*, Travelers did not refuse to approve the settlement, and the Woodalls were able to settle their claim and release the tortfeasor, making it unnecessary to join Travelers in the suit against the tortfeasor.

Under the substantive law set forth in §627.727(6), Fla. Stat. (1982), a cause of action for an underinsured motorist claim cannot accrue on the date of the accident. It is axiomatic that a cause of action cannot accrue prior to the time that it is created, since a cause of action cannot exist before it is created. In light of the substantive law enacted by the Legislature post-Kilbreath, this Court should give effect to the Legislature's mandate that a cause of action for an underinsured motorist claim is created when the injured person agrees to settle a claim with the liability insurer for the limits of liability and such settlement would not fully satisfy the claim for personal injuries, and find that under the post-Kilbreath substantive law of Florida, a cause of action for an underinsured motorist claim no longer can be considered to accrue

on the date of the accident.

B. Section 627.727(3) Does Not Define an Underinsured Motorist Claim

Travelers argues that the term underinsured is included within the meaning of the term uninsured, citing §627.727(3), Fla. Stat. (1973). Section 627.727(3), Fla. Stat. (1973), defines the term "uninsured motor vehicle," but it does not define the term "underinsured motorist claim" nor does it provide any substantive law for the treatment of an "underinsured motorist claim." The primary statutory, substantive law for the treatment of an "underinsured motorist claim" originated in the 1982 amendment to §627.727(6), Fla. Stat.

Travelers argues that there is no difference between the treatment of an uninsured motorist claim and an underinsured motorist claim, citing Dewberry v. Auto-Owners Insurance Company, 363 So.2d 1077 (Fla. 1978) and Williams v. Hartford Accident and Indemnity Company, 382 So.2d 1216 (Fla. 1980), as authority. The accidents in Dewberry and Williams occurred in 1976 and 1973, respectively. At the time of these decisions, Travelers' argument that there was no difference between the treatment of an uninsured motorist claim and an underinsured motorist claim would have been correct, because the Legislature had not yet enacted §627.727(6), Fla. Stat. (1982). For this reason, neither Dewberry nor Williams are relevant to the issue before this Court.

Travelers' argument simply misses the mark. The proper question is not whether the term underinsured is included within the meaning of the term uninsured, or whether there was no difference

between the treatment of an uninsured motorist claim and an underinsured motorist claim at some earlier historical time, but rather, the real question to be asked and answered by this Court is whether, at the time of the Woodall accident, there was an exclusive, substantive, statutory scheme for the treatment of an underinsured motorist claim. This Court will find that law in §627.727(6), Fla. Stat. (1987).

C. The woodalls Did Not Have a Right of Recovery Against Travelers Without First Exhausting the Tortfeasor's Liability Coverage

Section 627.727(6), Fla. Stat. (1987), specifically provides that "the liability insurer's coverage shall first be exhausted before any award may be entered against the underinsured motorist insurer." The "no action/exhaustion clause" in Travelers insurance policy provides that no payment will be made until after the limits of liability have been used up under all liability insurance policies, and no action may be brought against Travelers unless the insured has fully complied with all the provisions of the policy. Travelers "no action/exhaustion clause" successfully mirrors the statutory scheme set forth in §627.727(6).

Travelers cites Arrieta v. Volkswagen Insurance Co., 343 So.2d 918 (Fla. 3d DCA 1977), Apodaca v. Old Security Casualty Insurance Company, 348 So.2d 677 (Fla. 3d DCA 1977), and United States Fidelity and Guaranty Company v. State Farm Mutual Automobile Insurance Company, 369 So.2d 410 (Fla. 3d DCA 1979), as authority for its argument that, irrespective of the prohibition set forth in §627.727(6) and its own "no action/exhaustion clause," the Woodalls

had a right to bring an action against Travelers without first exhausting the tortfeasor's Liability coverage. Each of these cases were arbitration actions, and were decided on the law as it existed prior to the Legislature's 1982 amendment to §627.727(6). As such, these cases offer no relevant precedent upon which this Court can rely. Additionally, the question *sub judice* is not whether the Woodalls could have petitioned for arbitration, but rather, whether the woodalls could have brought their underinsured motorist action against Travelers. Under the substantive statutory scheme for underinsured motorist claims set forth in §627.727(6), the Woodalls were prohibited from obtaining an award against Travelers until the tortfeasor's liability coverage was first exhausted. Under the "no action/exhaustion clause", which mirrors §627.727(6), the Woodalls were prohibited from bringing an action against Travelers until the tortfeasor's liability coverage was first exhausted.

More importantly, the events which would have given rise to the creation of the Woodalls' underinsured motorist claim under the definition set forth in §627.727(6), had not yet happened, i.e. the Woodalls underinsured motorist claim did not yet exist. See Wardrop, supra. Under the statutory scheme enacted by the Legislature and also under the "no action/exhaustion clause," the Woodalls did not have an ascertainable claim which could have been brought against Travelers until almost six years after the date of the accident.

D. The "No Action/Exhaustion Clause" Is valid Because It Mirrors Section 627.727(6)

Travelers cites Liberty Mutual Insurance Co. v. Reyer, 362

So.2d 390 (Fla. 3d DCA 1978), an arbitration case in which the Court found that the policy language prohibiting the UM insurer from legally conditioning its obligation to afford UM coverage upon the insured first pursuing the tortfeasor to a settlement or judgment was, by clear Legislative intent, against public policy. The Reyer accident occurred in 1976, six years prior to the 1982 amendment to §627.727(6). Section 627.727(6) reflects a revised Legislative intent and public policy by prohibiting entry of an award against the UM insurer until all liability coverage is first exhausted. The Reyer decision and the other authority cited by Travelers are of historical interest, but do not reflect the public policy and Legislative intent at the time of the Woodall accident. The public policy and Legislative intent regarding underinsured motorist claims changed with the 1982 amendment to §627.727(6).

Travelers argument regarding the invalidity of its own "no action/exhaustion clause" reeks with duplicity. Travelers first argues that the Woodalls' cause of action accrued on the date of the accident and the Woodalls should have filed suit against Travelers [even though its "no action/exhaustion clause" precluded the Woodalls from filing suit against Travelers for the very cause of action that Travelers says had accrued]. Travelers next argues that the "no action/exhaustion clause" [which Travelers drafted and imposed upon the Woodalls as an adhesion contract] is void as against policy under Reyer, and therefore should not be enforced against Travelers [but instead, the Woodalls alone should bear the full burden of the "void" language which Travelers drafted and imposed on its policyholders]. Travelers argument on this issue is

both duplicitous and unconscionable.

When the language of an insurance policy is clear and unambiguous, it must be enforced as written. Florida Power & Light Company v. Penn America Insurance Company, 654 So.2d 276, 277-278 (Fla. 4th DCA 1995). Terms in insurance policies, like terms in a statute, should be accorded their plain and unambiguous meaning. Old Dominion Insurance Company v. Elysee, Inc., 601 So.2d 1243, 1245 (Fla. 1st DCA 1992).

The terms of an insurance contract should be construed strictly against the drafter, and the policy language should be construed liberally in favor of the insured, and strictly against the insurer, so as to effect the dominant purpose of payment. Newton v. Auto-Owners Insurance Company, 560 So.2d 1310, 1312 (Fla. 1st DCA 1990), review denied, 574 So.2d 139 (Fla. 1990). It is well settled that insurance policies should be construed liberally in favor of the insured. Dauksis v. State Farm Mutual Automobile Insurance Company, 623 So.2d 455, 457 (Fla. 1993).

The Woodalls complied with the plain language of the insurance contract and were induced by Travelers to believe that they had no cause of action until after the limits of liability coverage were exhausted. The "no action/exhaustion clause" is clear and unambiguous and must be construed according to its plain meaning, and strictly enforced against Travelers as written.

E. The Statute of Limitations Had Not Run

Uninsured motorist coverage is excess over and above the tortfeasor's liability coverage. Secs. 627.727(1) and (6), Fla. Stat. (1987). The Woodalls had no ascertainable claim until the

express requirements of §627.727(6) and the insurance policy had been satisfied. Entitlement to **underinsured** motorist benefits is not immediately ascertainable, and the woodalls' claim for these benefits became operative only after they had established their **underinsured status** under §627.727(6), i.e. occurrence of the events which **created** an **underinsured** motorist claim. These were also the events which triggered an entitlement to payment under the language of the Travelers policy. These were also the events that established that the claim would be excess and over the tortfeasor's liability coverage. **The substantive law set forth in §627.727(6) provided the "measuring stick" to determine whether or not Mr. Woodall had an underinsured motorist claim, i.e. an entitlement to payment of underinsured motorist benefits from Travelers.** Until these events occurred, the Woodalls had no ascertainable claim that could have accrued.

Travelers denied coverage and refused to pay the woodalls' claim for underinsured motorist benefits provided by the policy. The Woodalls brought this action to enforce their rights under the policy when Travelers breached the insurance contract by its denial of coverage and refusal to pay.

Whether this Court finds that the woodalls' **underinsured** motorist cause of action **accrued on the date it was created** under the substantive provisions of §627.727(6), Fla. Stat. (1987), or in the alternative, the Woodalls' **underinsured** motorist cause of action **accrued on the date that Travelers breached the contract by denial of coverage and refusal to pay,** the five-year statute of limitations had not run at the time of filing of this action.

CONCLUSION

The certified question should be answered in the negative. The law applied to the facts in Woodall provide this Court with a compelling opportunity to revisit Kilbreath and give effect to the substantive statutory scheme enacted by the Legislature in §627.727(6), Fla. Stat. (1982), as it should be applied to an underinsured motorist claim.

This Court should find that the Woodalls' underinsured motorist claim did not accrue on the date of the accident, but rather, accrued either at the time it came into existence under §627.727(6), Fla. Stat. (1987), or in the alternative, when Travelers breached the insurance contract.

This Court should further find that the "no action/exhaustion clause" should be enforced against Travelers and find that the cause of action did not accrue before Travelers became obligated to make payment.

The decision of both the trial court and the First District Court of Appeal should be reversed, and the cause remanded to the trial court for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to DEBORAH C. DRYLIE, ESQUIRE, Post Office Box 1526, Gainesville, Florida, 32602, attorney for Respondent; SUSAN J. SILVERMAN, ESQUIRE, 1800 Second Street, Suite 819, Sarasota, Florida 34236, attorney for Amicus Curiae Academy of Florida Trial Lawyers; RHONDA B. BOGGESS, ESQUIRE, Barnett Center, Suite 3500, 50 North Laura Street, Jacksonville, Florida 32202, attorney for Amicus Curiae Florida Defense Lawyers Association; and ROBERT J. DENSON, ESQUIRE, Santa Fe Community College, Office of the President, 3000 N.W. 83rd Street, Gainesville, FL 32606-6200, attorney for Petitioners, this 31th day of January, 1997.

Richard J. Delmond

Richard J. Delmond, Esquire
Florida Bar No. 251372
9211 N.W. 13th Place
Gainesville, FL 32606
(352) 376-1100
Attorney for Petitioners