IN THE SUPREME COURT OF FLORIDA

Supreme Court case #: 92,577
Third District Court of Appeal Case #: 96-01154

ANDERSON A. MEDINA, SR., & JORGE PEREZ,

Petitioners,

v.

DAVID PERALTA,

Respondent.

AMENDED INITIAL BRIEF OF PETITIONERS

ANGONES, HUNTER, McCLURE, LYNCH & WILLIAMS, P.A.

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INTRODUCTION

Petitioners, Anderson A. Medina, Sr. (Medina) and Jorge Perez (Perez) seek review of the Third District Court of Appeal's decision in *Medina v. Peralta, 705 So.2d 703 (Fla. 3DCA 1998).* *(Appendix 1)* This Initial Brief is submitted on behalf of the Petitioners Medina and Perez. References to the Record on Appeal will be by the symbol "R" and all emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Peralta sued (R. 2-10) Medina and Perez as well as Allstate Insurance Company (Allstate), his own underinsured motorist carrier, following an automobile accident which occurred in April of 1990. As a result of injuries sustained in the accident, Peralta received medical treatment paid for in part by his no-fault carrier.

On January 3, 1996 Allstate moved in limine to preclude any discussion of underinsured motorist coverage (R. 105-106). The Court granted the motion also indicating that Allstate would not be bound under the terms of its policy unless the jury rendered a verdict in excess of Medina's and Perez's liability limits of $100,000. Peralta ultimately obtained a verdict against Medina and Perez consisting of $10,000 for past medical expenses and $5,000

for past pain and suffering for a total of $15,000. (R.119-120).

Following the verdict, Perez and Medina contended that they were entitled to a set-off in the amount of Peralta's no-fault benefits payable for past medical expenses. The Court rejected this argument and entered judgment (R. 169) in the full amount of the verdict ($15,000), against Medina and Perez.[1]

After the Court entered final judgments for damages (R. 169) and costs (R. 170) in favor of Peralta, Medina and Perez appealed (R. 165-167) both judgments to the Third District Court of Appeals. Peralta then filed a Notice of Cross-Appeal (R. 168) directed to the "Final Judgment for Damages entered on April 1, 1996, denying Plaintiff's Motion for a New Trial and Additur." It is important to note that the aforementioned Motion For New Trial never asserted that Peralta was entitled to a new trial against Medina and Perez based on the trial court's ruling on the Motion in Limine precluding reference to Allstate, the underinsured motorist carrier. It is also important to note that the trial court never entered a judgment in favor of Allstate. In other words, and as

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[1] In doing so, the Court, in effect, also denied the Petitioners' Motion for Attorney's Fees and Costs filed pursuant to §768.79 Fla. Stat. (1995). The Motion was based on an offer of judgment (R. 150-153) filed on behalf of Medina and Perez in the amount of $12,499.

the style of the Third District's opinion makes perfectly clear, Allstate is not a party to these proceedings.

Ultimately, the Third District, with Chief Justice Schwartz dissenting (R 221-225), held that the trial court's ruling precluding the jury from learning of the existence of the underinsured motorist carrier was contrary to this Court's decision in *Government Employees Insurance Company v. Krawzak, 675 So.2d 115 (Fla. 1996)* and as such, constituted "per se" reversible error. In so ruling, the Third District certified conflict with the Fourth District's decision in *Furtado v. Walmer, 673 So.2d 568 (Fla. 4th DCA 1996)*.[2] Accordingly, the Third District reversed the final judgments and remanded the cause for a new trial. (R. 224). This petition follows.

SUMMARY OF THE ARGUMENT

The Third District and the Fourth District have reached different conclusions as to standard of review which is applicable in determining whether or not a plaintiff is entitled to a new trial against a tortfeasor when a trial court fails to permit the plaintiff to disclose to the jury that his or her

[2] The Third District also conceded that if the so-called "Krawzak violation" was subject to harmless error review, "the error in this case would undoubtedly be harmless." (R. 224, n. 4).

uninsured/underinsured motorist carrier is a party to the litigation. While in *Government Employees Insurance Company v. Krawzak*, this Court affirmed the opinion of the Fourth District in *Krawzak v. Governmental Employees Insurance Co., 660 So.2d 306 (4th DCA 1995)* which ordered a new trial against the tortfeasor and the plaintiffs' underinsured motorist carrier, there were two independent errors which mandated reversal. Thus, neither *Krawzak* decision indicates that a new trial is warranted against the tortfeasor based on the failure to disclose the presence in the litigation of the underinsured motorist carrier.

Finally, since §*59.041 Fla. Stat. (1995)* states that a harmless error analysis is applicable on appeal and since the plaintiff cannot otherwise possibly demonstrate why the failure to disclose the presence of his own underinsured motorist coverage is improper as to his case against the tortfeasor, the Third District's ruling setting a *per se* reversible error standard is wrong.

ARGUMENT

THE FAILURE TO DISCLOSE TO THE JURY THAT THE PLAINTIFF'S UM/UIM CARRIER IS A PARTY TO THE LITIGATION DOES NOT CONSTITUTE *PER SE* REVERSIBLE ERROR WITH RESPECT TO THE PLAINTIFF'S CASE AGAINST THE TORTFEASOR

The issue before this Court is whether under the facts of this case, the ruling regarding the UIM insurer is *per se* reversible error or subject to a harmless error analysis. The petitioners submit that severance does not always require reversal and accordingly, we request that this Court adopt Judge Schwartz's dissenting opinion in *Medina v. Peralta*, Judge Klein's special concurrence in *State Farm Mutual Automobile Ins. Co. v. Miller, 688 So.2d 935 (Fla. 4th DCA 1996)* as well as the Fourth District's decision in *Furtado v. Walmer, supra*.

At this point, we also assert that there appears to be a real question as to whether or not *Government Employees Insurance Company v. Krawzak, 675 So.2d 115 (Fla. 1996)* dictates that the failure to make a particular jury aware that the plaintiff's UM/UIM carrier is a party to the litigation constitutes error, either harmless or *per se*, with respect to the action against the tortfeasor. While this Court's decision approved the Fourth District's decision in *Krawzak v. Government Employees Insurance Company, 660 So.2d 306 (Fla. 4th DCA 1995)* which in turn reversed the trial court's judgment and remanded the cause for a new trial with respect to the plaintiff's claim against both the tortfeasor and her underinsured motorist carrier, it appears that the sole basis for reversal against the tortfeasor was the improper

exclusion of testimony concerning the plaintiff's earnings.

The extensive discussion in the Fourth District's opinion regarding the exclusion of the underinsured motorist carrier from the courtroom also appears to have been specifically directed to the plaintiff's contention that she was entitled to a new trial against her underinsured motorist carrier. This is because the reasons given by the Fourth District as to why the exclusion of the underinsured motorist carrier was error clearly do not apply to the tortfeasor.

For example, the Fourth District emphasized that in a situation where one brings a UM or UIM claim, the carrier is the real party in interest and if there had been a settlement with the tortfeasor, there would be no question that the UM/UIM carrier would have been the only party before the jury. *660 So.2d at 309.* The Fourth District also emphasized that the contract of insurance entered into between the plaintiff and the UIM carrier required that the plaintiff insured sue the UIM carrier along with the tortfeasor. *Id.*

Finally, in *Krawzak* this Court and the Fourth District drew a distinction between *§627.7262 Fla. Stat. (1991) (Nonjoinder of Liability Insurers)* and *§627.727(6) Fla. Stat. (1991)* which requires the joinder of the UM/UIM carrier. In the case of the

latter statute, the jury must be made aware of the presence of the UM/UIM carrier which has been joined in the action against the tortfeasor. Parenthetically, §627.7262 mandates that in an action against the tortfeasor, the jury should not be made aware that the tortfeasor has liability coverage. In sum, while there is a specific statute which mandates a severance of the liability carrier from a lawsuit against the tortfeasor, both the insurance contract and the UM/UIM statute in question in *Krawzak* mandate a joinder of the UM/UIM carrier.

Notwithstanding our contention that as to the tortfeasor of the failure to make known to the jury the fact that the underinsured motorist carrier is a party to the litigation does not constitute any error, we certainly believe, as asserted above, that at a minimum such a ruling is harmless error as to the plaintiff's case against said tortfeasor. In this respect we would urge that the Court adopt the special concurrence of Judge Klein in *State Farm Mutual Automobile Ins. Co. v. Miller, 688 So.2d at 936.* As Judge Klein indicates, in *Stecher v. Pomeroy, 253 So.2d 421, (Fla. 1971)* this Court adopted the Fourth District's decision in *Stecher v. Pomeroy*, 244 So.2d 488 (Fla. 4th DCA 1971) which held that a ruling by the trial court which erroneously permitted the jury to become aware of the insurance policy limits and hence, the

existence of liability insurance coverage was subject to a harmless error analysis. If, as Judge Klein points out, such is the case then "it follows" that any error in failing to advise the jury of the availability of underinsured motorist coverage should also be subject to such a harmless error analysis.

As Judge Klein further emphasizes, Florida has two harmless error statutes, §*59.041* Fla. Stat. *(1995)* and the harmless error statute applicable to criminal appeals- §*924.33 Fla. Stat.* Both statutes essentially indicate that no judgment shall be set aside or reversed or a new trial granted unless after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. In *State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)* this Court pointed out that while the legislature was free to enact harmless error statutes, the Courts were free to establish that certain errors always violate the right to a fair trial and those are *per se* reversible. However, this Court indicated that to do so, the Court must perform a "reasoned analysis" and conclude that for constitutional reasons, it must override the legislative decision. *Id. at 1134.*

Certainly, the Third District's decision in this case lacks such an analysis. The Court simply refers to this Court's decision in *Krawzak* which, as we demonstrate above, never addressed the

issue as to whether or not the failure to permit the jury to made aware that the underinsured motorist carrier is a party to the litigation constitutes *per se* reversible error as to the case against the tortfeasor. Accordingly, we believe that the Fourth District's decision in *Furtado* applies the proper standard of review as set forth in §59.041 Fla. Stat. (1995). We therefore request that this Court reverse the Third District's decision and adopt the Fourth District's decision in *Furtado* and more specifically Judge Klein's special concurrence in *State Farm Mutual Automobile Ins. Co. v. Miller* and Judge Schwartz's dissent in the case below.

CONCLUSION

For the reasons set forth above, the Third District's decision should be quashed and the case remanded to the Third District for purposes of considering the issue raised in the Petitioners' original appeal, i.e. whether Perez and Medina were entitled to a set-off in the amount of Peralta's no-fault benefits payable for past medical expenses.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 28th day of April, 1998 mailed to Pamela Beckham, Esq., attorney for appellee/cross-appellant, 1550 Northeast Miami Gardens Drive, Suite 504, North Miami Beach, FL; Ronald Rodman, Esq., 3636 W. Flagler Street, Miami, FL 33024.

Respectfully submitted,

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APPENDIX

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1998

ANDERSON A. MEDINA, SR., and JORGE PEREZ,

Appellants/Cross-Appellees,

vs.

DAVID PERALTA,

Appellee/Cross-Appellant.

CASE NO. 96-1154

LOWER TRIBUNAL NO. 93-20474

Opinion filed February 11, 1998.

An Appeal from the Circuit Court for Dade County, Harold Solomon, Judge.

Angones, Hunter, McClure, Lynch & Williams, and Christopher J. Lynch, for appellants/cross-appellees.

Beckham & Beckham, and Robert Beckham, Jr., for appellee/cross-appellant.

Before SCHWARTZ, C.J., and SHEVIN and SORONDO, JJ.

SORONDO, J.

Anderson A. Medina, Sr. (Medina) and Jorge Perez (Perez), appeal from final judgments for damages and costs in favor of David Peralta (Peralta). Peralta cross-appeals seeking a new trial based upon a ruling on a motion in limine precluding the jury from learning of the existence of Peralta's underinsured motorist

carrier, Allstate Insurance Company (Allstate).

On November 1, 1993, Peralta filed a complaint against Medina, Perez and Allstate, regarding an automobile accident which took place on April 8, 1990. Medina and Perez filed an answer, as did Allstate, which also filed cross-claims against Medina and Perez.

On January 3, 1996, Allstate moved in limine to preclude any discussion of insurance premiums paid by Medina with respect to uninsured motorist coverage relying on Colford v. Braun Cadillac, Inc., 620 So. 2d 780 (Fla. 5th DCA 1993). Allstate agreed not to participate in the trial, except for purposes of the final judgment, and to waive its cross-claims. Peralta objected. The trial court found that Allstate would not participate in the trial, except for the final judgment, and would be bound under the terms of its policy for any amount found by the jury in excess of $100,000, up to the policy cap. The jury returned a verdict in favor of Peralta and the trial court ultimately entered a final judgment in the amount of $15,000.

Peralta's cross-appeal argues that the trial court erred by precluding the jury from learning of the existence of the underinsured motorist carrier. We find his cross-appeal to be meritorious and reverse. In Government Employees Ins. Co. v. Krawzak, 675 So. 2d 115, 117 (Fla. 1996), the Supreme Court of Florida held that "in actions to which section 627.727(6), Florida Statutes (1991), is applicable, it is appropriate for a jury to be aware of the presence of a UM insurer which has been properly joined in the action against the tortfeasor." In so holding, the

Court disapproved the holding of Colford upon which the trial judge relied.

The dissent takes the position articulated by the Fourth District Court of Appeal in Furtado v. Walmer, 673 So. 2d 568 (Fla. 4th DCA 1996), and Judge Klein's special concurrence in State Farm Mut. Auto. Ins. Co. v. Miller, 688 So. 2d 935, 936 (Fla. 4th DCA 1997), that Krawzak violations are subject to harmless error analysis. We have carefully reviewed the Supreme Court's decision in Krawzak and find the following language to be instructive in the resolution of this issue:

> In Dosdourian v. Carsten, 624 So. 2d 241 (Fla. 1993), we took a strong stand against charades in trials. To have the UM insurer, which by statute is a necessary party, not so named to the jury is a pure fiction in violation of this policy. The unknown consequences of such a fiction could adversely affect the rights of the insured who contracted and paid for this insurance.

Krawzak, 675 So. 2d at 118. The Court clearly characterizes what happened in Krawzak as a "charade," comparable to the "Mary Carter" agreements outlawed in Dosdourian. The Court further recognized that there are "unknown consequences" to this charade capable of "adversely affect[ing] the rights of the insured." Id. We observe first that the word "charade" is defined as a "readily perceived pretense," or "travesty." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 321 (3d ed. 1996). "Travesty" is defined as: "1) An exaggerated or grotesque imitation. . . 2) a debased or grotesque likeness; *a travesty of justice.*" Id. at 1905 (emphasis in original). Assuming, as we must, that the Supreme Court chose its

words carefully, and because the Court has acknowledged that such a "charade," or "fiction," has "unknown consequences," we fail to see how such an error could ever be accurately characterized as harmless. For these reasons, we believe that Krawzak violations are per se reversible and not subject to harmless error review.[1] In so holding we certify direct conflict with Furtado.

We reverse the final judgment entered herein and remand for a new trial. Based on our holding in the cross-appeal, the issues raised by the appellant are moot.

Reversed and remanded.

SHEVIN, J., concurs.

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[1]We concede that if a Krawzak violation is subject to harmless error review, the error in this case would undoubtedly be harmless.

SCHWARTZ, Chief Judge (dissenting).

In the light of the extremely weak evidence of the plaintiff's injuries, the actual verdict of $15,000.00 returned by the jury, and the fact that the underinsurance covered only damages in excess of $100,000.00, I think the acknowledged Krawzak error involved in this case was no more than harmless. Furtado v. Walmer, 673 So. 2d 568 (Fla. 4th DCA 1996)(Krawzak error harmless); State Farm Mut. Auto. Ins. Co. v. Miller, 688 So. 2d 935, 936 (Fla. 4th DCA 1997)(Klein, J., specially concurring)(same). Because I do not agree with the majority that a per se error rule applies to this issue, I would therefore affirm on the cross-appeal.

This conclusion makes it necessary to reach the merits of the defendants' appeal. On that point, it seems clear that the failure to credit the defendants with 80% of the $10,000.00 in PIP benefits was completely in conflict with the parties' agreement and, more important, with the mandatory terms of section 627.737(1), Florida Statutes (1997). Mansfield v. Rivero, 620 So. 2d 987 (Fla. 1993); Bennett v. Florida Farm Bureau Cas. Ins. Co., 477 So. 2d 608 (Fla. 5th DCA 1985). I would therefore remand with directions to reduce the judgment by $8,000.00 and for further appropriate proceedings.