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.

REPLY BRIEF OF PETITIONERS

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

CHRISTOPHER J. LYNCH, ESQ.
66 West Flagler Street
Ninth Floor Concord Building
Miami, FL 33130
(305)371-5000

TABLE OF CONTENTS

Table of Authorities

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 respondent has completely failed to demonstrate from a logical standpoint, why the failure to disclose to the jury that the plaintiff's UM/UIM carrier is a party to the litigation could somehow impact or harm the plaintiff's case against the tortfeasor. Significantly, the respondent also fails to address why §59.041 Fla. Stat. (1995), which indicates that a harmless error analysis is applicable on appeal, should be ignored in the context of the present case.

The plain fact of the matter is that there is no logical reason why a new trial against the tortfeasor is mandated in all circumstances where the plaintiff's underinsured motorist carrier is not named. In this respect, the undersigned cannot improve upon the reasoning set forth by Judge Schwartz in his dissent in Medina v. Peralta, 705 So.2d 703 (Fla. 3rd DCA 1998) or Judge Klein's special concurrence in State Farm Mutual Automobile Ins. Co. v. Miller, 688 So.2d 935 (Fla. 5th DCA 1996) and we will, accordingly, simply cite this Court to those opinions.

In addition, to say that Furtado v. Walmer, 673 So.2d 568 (Fla. 4th DCA 1996) does not stand for the proposition that a harmless error analysis is applicable in a situation where the court improperly excludes reference to the UM/UIM motorist carrier is unreasonable. As the Third District recognized in the case at bar, Furtado does stand for such a proposition and that is why the Third District certified conflict. This Court did not specifically overrule Furtado in Government Employees Ins. Co. Krawzak, 675 So.2d 115 (Fla. 1996) so Furtado is still on the books.[1] If it were otherwise, the Third District would not have certified conflict.

Finally, respondent's contention that Allstate is in some manner a party to this proceeding is tenuous at best. We emphasize once again that a judgment was never entered in the Court below in favor of Allstate. The Third District recognized this fact and Allstate is not named as a party in the Third District's opinion. If the respondent believes that they are correct and that the trial

---

[1] As we emphasize in our Initial Brief on pages 4-6, we don't believe the position we espouse in this case is inconsistent in any manner with this Court's decision in Krawzak since it appeared that the sole basis for reversal against the tortfeasor in Krawzak was the improper exclusion of testimony concerning the plaintiff's earnings.

court improperly precluded the jury from learning of the existence of Allstate as the UM/UIM carrier, the respondent should have a judgment entered by the trial court in favor of Allstate and then appeal that judgment to the Third District on the basis of the improper exclusion.

CONCLUSION

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 Petitioner's 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.[2]

---

[2] On page 11 of his Answer Brief, Peralta asserts that "This case is not worth this Court's review" because "It presents a very arcane issue." In response, we would simply state that there is undoubtedly numerous cases pending in the circuit courts and the appellate courts involving actions against UIM carriers and tortfeasors. In addition, even if this were the only case in Florida which was presently pending and which concerned this issue, that is not a reason why the Court should not address it if, as we assert, the Third District's decision is wrong. After all, this Court is in the business of righting wrongs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 26 day of May, 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,

ANGONES, HUNTER, McCLURE,
LYNCH & WILLIAMS, P.A.
9th Floor, Concord Bldg.
66 West Flagler Street
Miami, FL 33130

BY: _____
CHRISTOPHER J. LYNCH
Attorney for Petitioners