IN THE SUPREME COURT OF FLORIDA

Sup.Ct. SC00-492
4th DCA Case No. 98-3619
Case No. 96-13696 (25)

RANDY LAMZ and DEBORAH LAMZ,

Appellant,

vs

GEICO GENERAL INSURANCE COMPANY, a foreign corporation, MORRIS LEISNER, and MARNEE HEATHER NICHOLS

Appellees.

AMICUS BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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In accordance with Rule 9.210(a(2), we do hereby certify that the enclosed documents are typed using 14 point Times New Roman font.

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INTRODUCTION

The Academy of Florida Trial Lawyers, a voluntary organization of lawyers who represent victims of the wrongdoing of others, files this amicus brief in support of the Appellees.

Following the mandate of Ciba Geigy Limited BASFAG vs The Fish Peddler, Inc., 691 So.2d 1111 (Fla. 4th DCA 1997), the Academy of Florida Trial Lawyers forgoes a statement of the case and facts.

SUMMARY OF ARGUMENT

An underinsured motorist carrier who is lawfully sued and is properly joined as a party to the lawsuit must be disclosed in its actual status as a party defendant. An uninsured or underinsured motorist carrier should not be able to hide its true identity by being severed from the lawsuit while retaining its influence over the conduct of the lawsuit as co-counsel for the tortfeasor. GEICO vs Krawzak 675 So.2d 115.

This Court has taken a strong stand against charades in trials. Dosdourian vs Carsten, 624 So.2d 241 (Fla. 1993). The Court below in this case made a deft effort to circumnavigate the non-joinder statute, Section 627.4136, Florida Statutes in trying to affirm the Trial Court's determination that the specific role of GEICO need not be disclosed. This Court should revisit the non-joinder statute in light of its recent

pronouncements in Dosdourian and Krawzak, and in light of the change in the playing field in Fabre vs Marin, 623 So.2d 1182 and Messmer vs Teacher's Insurance Company., 588 So.2d 610 (Fla. 5DCA 1991).

This Court's prior opinion in Stecher vs Pomeroy, 253 So.2d 421 (Fla. 1971), correctly directs the lower Court to reveal the existence of an insurer as a real party in interest. Justification for this revelation reveals the true fact that there is financial responsibility and offsets any indulgence by counsel or the jury with unfounded arguments as complained by appellate hearing. It has always been asserted by the insurance companies of this State that they are the real parties in interest in negligence cases, and it has been recognized when an insurance company has both the financial stake in the outcome of the litigation and the burden of carrying the cost of the defense, it is defending its own interest and is entitled to defend by its own employee...Stecher id. at 423.

This Court needs to recognize that the exception the lower Court tried to carve in the case below caused by the non-joinder statute. Said statute is contrary to the dictates of this Court's holdings by allowing a charade in trials. To avoid the development of exception after exception damaging the Court's fundamental stand against charades in trial, the Academy prays this Court to recognize that the underpinnings of the lower Court's ruling are founded upon the lower Court's belief

that the non-joinder statute continues to be viable. This Court should determine the non-joinder statute fundamentally conflicts with this Court's policy as recently enunciated in Dosdourian and Krawzak and which is consistent with this Court's opinion in Stecher to determine as unconstitutional the non-joinder statute, Section 627.4136, Florida Statutes.

ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURORS OF THE TRUE IDENTITY OF THE UNDERINSURED MOTORIST CARRIER PURSUANT TO GOVERNMENT EMPLOYEES INSURANCE CO. VS KRAWZAK, 675 So.2d 115 (Fla. 1996)

This matter comes to this Court under the Court's conflict jurisdiction to determine whether the Fourth District Court's opinion in Lamz vs GEICO, 748 So.2d 319 (Fla. 4th DCA 1999) conflicts with this Court's pronouncement in GEICO vs Krawzak, 675 So.2d 115 (Fla. 1996).

The central issue decided by this Court in Krawzak was that an underinsured motorist carrier

> ...an underinsured motorist carrier who is lawfully sued by a plaintiff and is properly joined as a party to the lawsuit be disclosed to the jury in its actual status as a party defendant. An uninsured or underinsured motorist carrier should not be able to hide its true identity by being severed from the lawsuit while retaining its influence over the conduct of the lawsuit as co-counsel for the tortfeasor. In this case, this procedure seems inherently unfair to the plaintiff, deceptive to the jury, contrary to the insurance contract entered into between the plaintiff and its insurer, and contrary to statute, and upon remand we [the Supreme Court] direct that GEICO remain as a party before the jury. *ibid* at 310. (emphasis added)

In support of the proposition, the Supreme Court noted

> In Dosdourian vs 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 be 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. Id. at 117

Implicit in the underlying District Court of Appeal opinion in Lamz vs GEICO,

the Fourth District stated,

> we read Krawzak as requiring identification of a UM or UIM carrier as a party defendant and designation of the attorneys representing the carrier at trial. We do not read the case as mandating the revelation of the precise nature of the insurance coverage implicated in the case. The major policy reason behind the Krawzak rule -- the avoidance of charades at trial -- is satisfied by the disclosure of the insurer as a party and the identification of the lawyers at trial acting on its behalf. With such disclosure, a jury observing and listening to the carrier's lawyers will understand the carrier's position at trial.

The Court goes on to say,

> Revealing in this case that GEICO was the *underinsured* motorist carrier would have suggested to the jurors that the other defendants had insurance coverage. This runs counter to the policy of 'excluding improper references of a defendant's insurance coverage in civil proceedings...to preclude jurors from affixing liability where none otherwise exists or to arrive at excessive amounts through sympathy for the injured party with the thought that the burden would not have to be borne by the defendant.' Melara vs Cicione, 712 So.2d 429, 431 (Fla 3 DCA 1998) (citing Carls Mkts., Inc. vs Meyer, 69 So.2d 789, 793 (Fla 1953)); see Brush [vs Palm Beach County], 679 So.2d at 815; Nicaise vs Gagnon, 597 So.2d 305, 306 (Fla. 4 DCA 1992); cf. Dosdourian vs Carsten, 624 So.2d 241, 248 n.5 (Fla. 1993) (noting that the trial judge has discretion not to advise the jury of a settlement amount if doing so would unfairly prejudice a party).

The Fourth District Court should not be permitted to dilute this court's quite specific holdings in Medina and Krawzak. The exception carved out in the Fourth District Court's rationale makes it unclear when the "actual status" of an insurance party should be disclosed and will lead to a multitude of results, depending upon each District Court's interpretation of a variety of factual patterns.

Initially Krawzak mandates this Court to definitively enunciate that the language "actual status" used in this Court's opinion means exactly that. It is presumptuous to assume that jurors don't believe that insurance coverage exists. Clearly, the lower Court opinion strays from the course set by this Court in Krawzak for the reasons set forth below.

The Fourth District Court of Appeal's reliance upon this language clearly recognizes its concern for the dictates of the non-joinder statute. The opinion tried to circumnavigate a tortuous path to resolve this Court's mandates in Medina vs Peralta, 24 FLW S50, Jan 21, 1999 and GEICO vs Krawzak with the non-joinder statute, which has not been challenged since 1983. VanBibber vs Hartford Accident and Indemnity Insurance Company, 439 So.2d 880 (Fla. 1983).

Section 627.4136, Florida Statutes was enacted as former Section 627.7262, Florida Statutes in 1976 in response to the Supreme Court of Florida's decision in

Shingleton vs Bussey, 223 So.2d 713 (Fla. 1969). Chief Justice Ervin in the Court's opinion concluded that

> (1) ... a direct cause of action now inures to a third-party beneficiary against an insurer in motor vehicle liability insurance coverage cases as a product of the prevailing public policy of Florida. (emphasis added)
>
> Public policy is a molding device available to the judicial process by which changing realities and the attending manifested rules of fair play may be incorporated into our *corpus juris*. The classic opinion by Mr. Justice Cardoza in MacPherson v. Buick Motor Co. (1916), 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, is illustrative of the role of public policy as a catalyst toward the advancement of jurisprudence.
>
> The District Court concluded that liability policies as the one here involved should be construed as 'quasi-third party beneficiary contract', thereby giving the injured third party an unquestionable right to bring a direct action against the insurance company as a party defendant...
>
> > '(14) The general public, subjected to possible injury through Jackson's negligent operation of a motor vehicle, possessed more than a mere 'incidental' benefit from the contract to procure public liability insurance. It was, in effect, a real party in interest to this contract. The procuring of automobile public liability insurance of the type contemplated has connotations extending to the general public above and beyond the private interests of the two contracting parties. As was said by our Supreme Court in Simmon v. Iowa Mutual Casualty Co., 3 Ill.2d 318, 322, 121 N.E.2d 509, 511 (1954):
> > 'Automobile insurance has taken an important position in the modern world. It is no longer a private contract merely between two parties. The greater part of litigation in our trial courts is concerned with claims arising out of property damage, personal injury or death caused by operation of motor vehicles. The legislatures of all our States have

> recognized the hazards and perils daily encountered and as a result have enacted various pieces of legislation aimed at the protection of the injured party. Financial Responsibility acts, Unsatisfied Judgment Fund acts, and other similar laws are direct results of this concern. That the general welfare is promoted by such laws can be little doubted. Government and the general public have an understandable interest in the problem. Many persons injured and disabled from automobile accidents would become public charges were it not for financial assistance received from the insurance companies.
>
> '(15) The fact that plaintiffs' identity may not have been known at the time the contract to procure insurance was made does not prevent them from assuming the status of third party beneficiaries. * * *' (Emphasis in text.)

> It cannot be disputed that securance of liability insurance coverage protection for the operation of a motor vehicle, regardless of whether the policy is secured to meet the requirements of Ch. 324, F.S., is an act undertaken by the insured with the intent of providing a ready means of discharging his obligations that may accrue to a member or members of the public as a result of his negligent operation of a motor vehicle on the public streets a highways of this state. (emphasis added)

Following the first enactment of Section 627.7262, Florida Statutes, this Court reviewed the statute in Markert vs Johnston, 367 So.2d 1003 (Fla. 1978). As reviewed by Chief Justice England in the Court's opinion at page 1004,

> Prior to the enactment of Section 627.7262, the joinder of insurance companies in tort litigation had been exclusively a concern of the judiciary. Until 1969, the Court barred either joinder or mention of

insurers in tort suits[5]. In that year, the Court recognized in Shingleton vs Bussey, 223 So.2d 713 (Fla 1969), as a matter of public policy, that insurers are the real parties in interest in lawsuits against their insured tortfeasors, and it authorized a right of direct action against them.[6] The statute now before us is the first legislative attempt to affect this issue.[7] It is characterized by its proponents as an attempt to return the public policy of the State to its status before Shingleton. (emphasis added)

[1] The dispute in this case centers largely on whether the Court in Shingleton established a substantive right[8] to sue insurers by adding them to the class of litigants within the then existing 'real party in interest' rule of procedure[9], in the absence of a legislative act on the

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[5] Artille v. Davidson, 126 Fla. 219, 170 So. 707 (1936). The mention of insurers, as distinct from their joinder, has been treated as a procedural subject immune from legislative alteration. See Carter v. Sparkman, 335 So.2d 802 (Fla. 1976) contrast School Board of Broward County v. Price, 362 So.2d 1337 (Fla. 1978).

[6] One year later we expanded the right of direct action to include all liability insurance companies. Beta Eta House Corp. vs Gregory, 237 So.2d 163 (Fla. 1970).

[7] A second statute of similar import was enacted in 1977 as part of an insurance and tort reform statute. Ch. 77-468, § 39, Laws of Fla., creating § 768.045, Florida Statutes (1977). That statute is not before us, and we make no determination of its validity. In State vs Lee, 356 So.2d 276 (Fla. 1978), we did hold that this statute does not violate the 'one subject' provision of the Florida Constitution (Art. III, §6, Fla. Const.) and that it is not invalid simply because another of its provisions was unconstitutional. We declined, however, to rule on other constitutional aspects of this provision.

[8] A recurring argument advanced by proponents of the statute is that the issue of joinder of insurers is simply a matter of public policy, the declaration of which is primarily a legislative function. It is asserted that only in the absence of a constitutional or statutory declaration may public policy be determined by the Courts. The fallacy in that reasoning, of course, is that, as a matter of constitutional imperative, only the Supreme Court has the power to adopt rules of practice and procedure for Florida courts. The fact that our rules may reflect the prevailing public policy -- whether by design or by coincidence -- obviously does not enable the legislature to encroach on our rule-making authority. The separation of powers doctrine precludes that result. Art. II, § 3, Fla. Const. (emphasis added).

[9] Fla. R.Civ.P. 1.210. Advocates for this position note that the Court in Shingleton did not adopt a rule to accommodate the objective achieved, as was later done in Carter vs Sparkman, 335 So.2d 802 (Fla 1976). This suggests to them that Shingleton created

> subject. Admittedly, language in Shingleton's majority and dissenting opinions, and in subsequent cases, both support and refute this position. It is not essential to our decision, however, that we resolve that issue, since the plain language of Section 627.7262, Florida Statutes, makes that unnecessary. It provides rather clearly that the joinder of insurers is merely a procedural step in the conduct of a motor vehicle tort lawsuit.[10]

The Supreme Court determined that the statute clearly is procedural, and deemed it unconstitutional.

In 1982, in response to the Court's determination in Markert, *supra*, the legislature readopted the Section 627.7262, Florida Statutes, now known as Section 627.4136, Florida Statutes. This Court ruled Section 626.7262, Florida Statutes, constitutional in VanBibber vs Hartford Accident and Indemnity Insurance Company, 439 So.2d 880 (Fla. 1983).

The Academy finds support in this position in the well-reasoned dissent of Justice Shaw. In VanBibber vs Hartford, he explained the "non-joinder" statute is unconstitutional because it impermissibly abrogates a right of action which existed under the Florida Constitution of 1885; unconstitutionally denies due process and unconstitutionally denies or delays the right of access to the courts under Sections 9

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a substantive right.

[10] See In re Florida Rules of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1972) Adkins, J., concurring), characterizing steps in the course of litigation as 'procedural'.

and 21 respectively, Article I, Florida Constitution 1968. His well-reasoned analysis determined:

> Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969), overruled Artille v. Davidson, 126 Fla. 219, 170 So. 707 (1936), by holding that an injured plaintiff had a direct cause of action against a motor vehicle liability insurer which accrued concurrently with the right of action against the insured defendant, contingent on the later establishment of liability to judgment of the insured defendant. The tort suit in Shingleton was filed sometime prior to June, 1968, and was controlled by the Constitution of 1885[1]. Under then existing law (Artille), as under section 627.7262 here, a plaintiff could not bring suit against a liability insurer until a judgment was obtained against the insured defendant. As here, the constitutional issue in Shingleton was whether the right of action against the insurer could be denied or delayed until such time as judgment was obtained against the insured defendant. Our answer was an unequivocal no, because, *inter alia*, [t]his hardly comports with Section 4, Declaration of Rights, State Constitution [1885], F.S.A., that the courts shall be open so that persons injured shall have remedy by due course of law without denial or delay. 223 So.2d at 717. (emphasis added).
>
> In explaining the Shingleton decision, then Chief Justice Ervin rigorously examined, in addition to the constitutional issues, the various public policy factors bearing on liability insurance and the rights of the various parties to such suits. To my mind, Shingleton established beyond a doubt that it is sound public policy to immediately bring all of the real parties in interest into court in order to protect their rights, to facilitate the litigation, and to resolve the dispute. I will not restate in full Chief Justice Ervin's penetrating examination of these public policy factors; in short, he reasoned that motor vehicle liability insurance is commonplace, that it is statutorily required, that it is primarily for the benefit of injured third parties, that the liability insurer is a real party in interest, and that it is unrealistic to defer accrual of the cause of action

[1] See Bussey v. Shingleton, 211 So.2d 593 (Fla. 1DCA 1968), issued 6 June 1968.

against the insurer until judgment is obtained against the insured defendant.

If Shingleton were grounded exclusively on the public policy views of this Court, I would agree with the majority that we should yield to a valid, contrary legislative pronouncement and hold the statute constitutional. In fact, however, Shingleton was founded on three independent, but mutually supportive, grounds: public policy; constitutional right of access to the courts and justice without sale, denial, or delay; and the constitutional authority of this Court to promulgate judicial procedure (specifically liberal joinder rules providing due process). Chief Justice Ervin's opinion shows clearly that fundamental constitutional rights (access to courts and due process) are not only consistent with, but serve to advance sound public policy:

> In the modern world which is fraught with public safety hazards, it is unrealistic that mass liability insurance coverage designed to afford protective benefits for the general public should contain such condition precedent [no joinder clauses] as a barrier to the right of identified members of the protected class to pursue a speedy, realistic and adequate recovery action. This hardly comports with Section 4, Declaration of Rights, State Constitution [1885], F.S.A., that the courts should be open so that persons injured shall have remedy by due course of law without denial or delay.

Id. at 717.

The rights and the grants and limitations of power embodied in our federal and state constitutions were inserted precisely because they were good public policies; presumably, they still are good public policies. One could, for example, take each of the twenty-three sections of the Declaration of Rights and argue, persuasively, that each is defensible as sound, contemporary public policy. However, one could also argue, unpersuasively I trust, that trial by jury, for example, is too costly and inefficient from a contemporary public policy viewpoint. If the

proponents of such a view obtained a legislative majority and enacted a law rescinding the right to trial by jury on public policy grounds, would we be obliged to defer to the legislative pronouncement of public policy? Obviously not; we would be obliged to hold that the statute was unconstitutional. The fact that a legislative act is said to be good public policy is not a basis for deferring to the legislature when a constitutional right is violated. See Markert v. Johnston, 367 So.2d 1003, 1005 n. 8 (Fla. 1978), where we rejected an analogous fallacy that the legislature could encroach on judicial rule making because the rules reflected prevailing public policy, by design or coincidence[2]. Even if one holds that Section 627.7262, Florida Statutes (Supp.1982), deals with substantive rights and that we should yield to the legislature on the separation of powers issue, it does not follow that the legislature may abrogate a right of action which existed under the Constitution of 1885, or may deny due process or delay access to the courts in violation of the Constitution of 1968.

Under the separation of powers doctrine, this Court has the constitutional duty to prescribe rules of judicial procedure. We have recognized that this does not include substantive rights which fall within the constitutional power of the legislature. The esoteric distinctions between procedure and substance are not always easy to define, but whatever the label, neither this Court nor the legislature may deny a litigant procedural due process. Our rules on liberal joinder are not merely prerogatives of this Court which we grant in order to conserve court resources under the rubric of public policy; they also serve to provide procedural due process. Chief Justice Ervin recognized this in *Shingleton* and I agree with his cogent analysis at page 719: denial of a direct action against the liability insurer may impermissibly serve to defeat recovery and deprive the plaintiff of an open, speedy and realistic opportunity to pursue by due process his right of an adequate remedy at law jointly against the insured and insurer.

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[2]. Note also that Markert recognized the issue of a concurrent right of action against the liability insurer but chose not to address the issue because the plain language of Section 627.7262, Florida Statutes, made it unnecessary.

I consider the challenged statute to be an unconstitutional denial of rights arising under Article 1, Sections 9 and 21 of the Constitution of 1968, and would so hold even if this issue were being presented for the first time and we were deciding the issue independently of Shingleton and the Constitution of 1885. However, as a matter of well established law, we must consider Shingleton and the Constitution of 1885 because [i]t, of course, is assumed that the citizens who adopted the 1968 Constitution intended that the language therein be given the same construction as similar language in the prior Constitution of 1885. Kluger v. White, 281 So.2d 1, 6 (Fla.1973) (Boyd, J., dissenting) (footnote quoting access to courts provision of 1885 Constitution omitted). I agree with the majority that this statute seeks to "modify" Shingleton by delaying the accrual of the cause of action against the insurer until judgment is obtained against the insured, but in my opinion the modification overturns entirely the only new law stated in Shingleton -- that the cause of action against the insurer and insured accrues concurrently. Thus, Shingleton is on all fours with the present case and we are faced with the straightforward issue of whether the legislature may override a decision of this Court based on our construction of the 1885 Constitution which the citizens of the state adopted when they ratified the Constitution of 1968. In my view, emphatically it may not. As we stated approvingly in Reed v. Fain, 145 So.2d 858, 866 (Fla.1962):

> It has been held, and we think with propriety, that "The judicial interpretation of constitutional provisions is so forcible that, where a new Constitution is adopted *without change of the rule laid down by the courts,* the construction is adopted by the new Constitution and becomes a part of it to the degree that it cannot be changed even by a statute expressly undertaking to do so." Lyle v. State, 80 Tex.Cr.R. 606, 193 S.W. 680 (Italics Supplied [by Reed court].)

In my view, the legislature may not abrogate the concurrent right of action established by Shingleton and ratified by the electorate when they adopted the Constitution of 1968.

> I am not persuaded that joinder of an insured and insurer, and litigation of negligence and insurance coverage issues in a single action, is prejudicial to the insurer. I agree with Chief Justice Ervin that jurors are not so immature and naive as to be incapable of impartially deciding issues involving liability insurers. I would add that our constitution provides for the right to a trial by jury and that our legal system has sufficient safeguards to ensure that the injured party, the insured, and the insurer all receive a fair trial from an impartial jury[3]. I note also that the rules of civil procedure provide for stipulations, admissions, pretrial conferences, and partial summary judgments which can be used to expedite trial proceedings by removing the issue of insurance coverage and contingent liability from the jury. If we assume that insurance coverage and contingent liability are either not at issue or that the insurance company has prepared the insurance policy so that it can be plainly read by the trial court so as to determine as a matter of law whether coverage and contingent liability exist, there should be few occasions to present the issue and relevant evidence to the jury. On the other hand, on those occasions when there is a factual issue as to coverage and contingent liability, it is in the interest of all parties, the legal system, and the public, to have this issue timely raised. It may well be the primary issue which will control settlement negotiations, party alignments, and trial strategies. One can visualize almost endless permutations, including whether the plaintiff prosecutes, settles, or dismisses the suit; whether the insured defendant is represented by his own or by insurer's counsel, defends or settles the suit, or brings a third-party action against the insurer; and whether the defendant insurer brings a declaratory judgment action, participates in, settles, or defends the suit. For the reasons aforestated, I would hold Section 627.7262, Florida Statutes (Supp.1982), to be unconstitutional. (emphasis added)

It has consistently been held since VanBibber vs Hartford, *supra*, that the insurance company, although not joined in the lawsuit, however is a real party in interest.

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[3] Safeguards include appeal by right and the responsibility and power of the trial court to ensure a fair trial through jury selection, rules of evidence, jury instructions, directed verdicts, mistrials, remittiturs, and new trials.

Support for the overturning of the non-joinder statute can be found in recent Supreme Court pronouncements:

> In GEICO vs Krawzak, 675 So.2d 115 (Fla. 1996), the Court stated: "In Dosdourian v. Carsten, 624 So.2d 241 (Fla.1993), we took a strong stand against charades in trials (emphasis added). To have the UM insurer, which by statute is a necessary party, not be 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.

This Court concluded that agreements that tend to mislead judges and juries border on collusion and are prohibited (Mary Carter Agreements). The Court stated at 246,

> We are convinced that the only effective way to eliminate the sinister influence of Mary Carter agreements is to outlaw their use. We include within our prohibition any agreement which requires a settling defendant to remain in the litigation regardless of whether there is a specified financial incentive to do so. The Court has sustained a statutory Mary Carter agreement between the insured and the insurer, but has not gone further to eliminate that fallacy.

Further, this Court was faced with the issue of whether an uninsured motorist carrier should be joined in a litigation; this Court held in GEICO vs Krawzak, *supra* that the jury should be aware that an underinsured motorist insurer which is properly sued and joined in action against a tort feasor under Section 620.727(6), Florida Statutes is a party in this case.

Next, the Court found that under Section 627(6), Krawzak had the right to join the tortfeasor and the UM insurer in one action to resolve their respective liabilities. Since Krawzak had a direct cause of action against GEICO as the UM insurer under the contract as well as under Section 627.727(6), the court reasoned that the presence of a UM insurer who is, lawfully sued and properly joined in a suit should be disclosed to the jury in its actual status as a party defendant. Id. at 309. Additionally, the court found that this conclusion was bolstered by our recent decision in Dosdourian vs Carsten, 624 So.2d 241 (Fla.1993), which encouraged full disclosure before the jury. 660 So.2d at 310. Consequently, the court certified conflict with Colford. Id. (emphasis added).

In Colford, the Fifth District Court of Appeal held that under section 627.727(6), the presence of a UM insurer should not be disclosed to the jury The court reasoned that the same considerations preventing disclosure of the presence of liability insurance under section 627.7262, Florida Statutes (nonjoinder of insurers), should apply to actions under section 627.727(6), required joinder statute. Those considerations are that the jury's awareness the presence of an insurance company could influence the jury verdict and that such awareness could allow innovative counsel to expand the focus of the idea coverage and the availability of insurance funds. 620 So.2d at 782-83. The court found that in a case in which there was no dispute over whether coverage existed, the considerations preventing disclosure outweighed the require that the UM insurer was required to be a party. Id. at 783.

We approve the decision below and resolve the conflict by finding 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. We agree with the well-reasoned opinion of the district court in this case and disapprove Colford to the extent it is in conflict with the district court's decision on this issue. (emphasis added).

We specifically note that section 627.727(6), Florida Statutes (1991), sets forth the procedure to be followed when a UM insurer does not approve a settlement with an underinsured tortfeasor. Under this

> version of the statute, the UM insurer has thirty days from receipt of a settlement agreement between the injured person or, in the case of death, the personal representative, and the liability insurer and its insured, to approve the settlement, to waive its subrogation rights against the liability insurer and its insured, and to authorize the execution of a full release. If the UM insurer does not agree to the settlement, then the statute instructs the injured person or, in the case of death, the personal representative, to sue both the tortfeasor and the UM insurer to resolve their respective liabilities. Because the statute directs joinder, the UM insurer is a necessary party in such an action, and the jury should be aware of the parties to an action about which, the jury is making a determination.

The playing field has changed tremendously since this issue was visited by the Supreme Court as evidenced by the analysis under GEICO vs Krawzak, *supra* and Dosdourian vs Carsten, *supra*. Further evidence that the playing field has shifted dramatically can be found in the Fabre vs Marin, 623 So.2d. 1182 and Messmer vs Teacher's Insurance Company, 588 So.2d 610 (Fla 5DCA 1991) doctrine, which permits non-parties to be included on jury verdicts in reducing the defendant's liability. To continue to permit the charade of the non-joinder statute is anachronistic and unsupported by any modern legal doctrine.

The Supreme Court held in Medina vs Peralta, 724 So.2d 1188 (Fla. 1999) "it is per se reversible error for a trial court to exclude from a jury the identity of an uninsured or underinsured motorist carrier that has been joined as a necessary party to the action." The Supreme Court has by these recent pronouncements enunciated

a policy that if it walks like a duck and has feathers like a duck and quacks like a duck, it is impermissible to allow insurance companies to duck under the "non-joinder" statute to gain an unfair advantage. This is a logical conclusion in light of our common law rules when "the court" considers the "changes in each social and economic customs and present-day conceptions of right and justice." Hoffman vs Jones, 280 S.2d 431 (Fla. 1973).

In conclusion, in order to maintain a consistent result in all cases and not to develop exceptions to the exception to the exception, as it begins in Lamz and taking us down the path of the dark side of exceptions for exceptions for exceptions. The Academy submits that the non-joinder statute issue, which is the underpinning of the Lamz decision, needs to be abrogated and revoked and declared unconstitutional. Only in this was will the charade being attempted to be perpetrated by GEICO can be avoided. The true matter can be litigated in a reasonable and fair manner, and that the true search for the truth can begin.

Consistent with this finding, this Court previously reached these same conclusions. Stecher vs Pomeroy, 253 So.2d 421 (Fla. 1971). The well-reasoned opinion in Stecher gave way to the politicized issues concerning "an insurance crisis". Since that time the playing field has transformed itself to being uneven in an adverse

way to plaintiffs; and this Court should revisit this issue in light of the Stecher opinion:

> One of the objectives of *Beta* and *Bussey* was to provide a disclosure of policy limits *between the parties* which had not previously been allowed. The reasons were for purposes of negotiation and to encourage settlement between the parties and thus shorten litigation and speed up the courts' heavy trial dockets. It was never intended that policy limits should go to the jury and Beta Eta expressly said so. It is immaterial for the jury's consideration, because the principles still stand that its decision must rest solely upon the evidence and the law as charged. Moreover, to reveal defendants' amount of insurance before the jury would equally entitled a defendant to bring out his coverage when the limits are minimal and advantageous to him. Neither one has relevancy and has no place before the jury.
>
> It was felt in reaching our decisions in *Beta* and *Bussey* that revealing the existence of an insurer as a real party in interest justifiably reflects the true fact that there is financial responsibility. This offsets any indulgence by counsel or the jury with unfounded arguments like, 'This poor, hard working truck driver and his family' approach, when in fact there is an ability to respond. It is probably not a factor in other instances where there is an obviously responsible principal defendant as in Compania Dominicana de Aviacion.
>
> It is fair to note also in this respect the holding of In re Rules Governing Conduct of Attorneys in Fla., 220 So.2d 6 (Fla. 1969), actively argued before this Court shortly prior to *Bussey*. There it was asserted by the insurance companies of this state then appearing (including three associations which 'represent 659 insurance companies who write the bulk of the fire, casualty and liability policies in Florida'), that they are the real parties in interest in these negligence cases; that the lawyers they employ and provide under the insurance policies to defend the cases, are really representing the *insurance carriers* in such litigation and 'when an insurance company has both the financial stake in the outcome of the litigation and the burden of carrying the costs of the

defense, it is defending its own interests and is entitled to defend by its own employee, so long as he is a member of the Bar and an officer of the Court.'

One of the insurance companies there asserted to this Court that:

> '[T]he legal responsibility placed on the insurance company give[s] pointed verification to the fact that the interest involved in defense of liability suits *is primarily* and ultimately *the interest of the insurance company*.
>
> It is the insurance company's interest, *as an entity*, that the lawyer represents, whether house counsel or fee counsel. (emphasis ours)'

If this position of the carriers is to be recognized, as it was at their urging by concurring with them in the position they asserted then, it surely follows that such *real party in interest* should be present and revealed when the cases are tried. Consistency in the law, and certainly consistency of one's position, is essential to equal justice.

WHEREFORE, the Academy submits that the underlying basis for the Fourth District Court of Appeal opinion in Lamz which relies upon the non-joinder statute, should be overruled, and that the non-joinder statute be declared unconstitutional. This is the only way to avoid various exceptions to a general rule.

CONCLUSION

The Academy prays this Court to recognize that the exception the lower Court tried to carve is occasioned by the non-joinder statute, which statute is contrary to the dictates of this Court's holdings by allowing a charade in trials. To avoid the development of exception after exception, damaging the Court's fundamental stand against charades in trial, the Academy prays this Court to recognize that the underpinnings of the lower Court's ruling are founded upon that Court's belief that the non-joinder statute continues to be viable, and further prays this Court to determine the non-joinder statute fundamentally conflicts with this Court's policy as recently enunciated in Dosdourian and Krawzak, and which is consistent with this Court's opinion in Stecher to determine as unconstitutional the non-joinder statute, Section 627.4136, Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail and this 16 day of August, 2001 to:

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