IN THE SUPREME COURT OF FLORIDA

METROPOLITAN CASUALTY INSURANCE COMPANY,

Petitioner,

vs.

ROBERT TEPPER and ANGEL LUCAS,

Respondents.

CASE NO.: SC07-2428

Appeal No.: 5D06-3713

7th Jud. Cir. No.: 06-497-CA
Flagler County

ANSWER BRIEF ON THE MERITS OF RESPONDENT ANGEL LUCAS

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PRELIMINARY STATEMENT

This Petition follows an Opinion published by the Fifth District Court of Appeal. Petitioner, METROPOLITAN CASUALTY INSURANCE COMPANY, was the Appellant below. It will be referred to as "METROPOLITAN" in this Brief. Respondent ANGEL LUCAS was the Appellee below, and he will be referred to as "LUCAS." The other named Respondent, ROBERT TEPPER, did not participate in the proceedings below, but will be referred to as "TEPPER" in this Brief. The appellate proceedings were conducted by the Honorable Judges Evander, Griffin, and Orfinger, who will be collectively referred to as the "appellate panel."

Legal citations contained in this Brief are intended to conform to Florida Rule of Appellate Procedure 9.800 and THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Rev., et. al. 17th Ed. 2000). All emphasis has been supplied by counsel unless otherwise noted.

STATEMENT OF THE CASE AND OF THE FACTS

Although METROPOLITAN's Initial Brief does provide a Statement of the Facts, LUCAS provides the following statements to provide the Court with a succinct record of the facts relevant to this proceeding.

I. Statement of the Case.

TEPPER sued both LUCAS and METROPOLITAN in circuit court. Metropolitan Cas. Ins. Co. v. Tepper, 969 So. 2d 403, 404 (Fla. 5th DCA 2007). The trial judge ultimately dismissed LUCAS from that action, and METROPOLITAN appealed. Id. The Fifth District Court of Appeal issued an Opinion which affirmed, in part, and reversed, in part, the trial judge's decision. Id. at 408. This Court has now accepted its discretionary jurisdiction to review the case pursuant to Article V, Section 3 of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A).

II. Statement of the Facts.

On May 13, 2004, TEPPER was riding his bicycle when he was hit by a vehicle owned and operated by LUCAS. Id. at 404. TEPPER thus filed a lawsuit against both LUCAS, as the alleged tortfeasor, and METROPOLITAN, as his underinsured motorists insurance carrier. Id.

LUCAS's liability insurer tendered its $25,000 policy limits to TEPPER as full settlement of his claim against LUCAS. Id. at 405. METROPOLITAN refused

to grant TEPPER permission to accept that settlement offer, and instead paid him the $25,000 in order to preserve its subrogation rights. Id.

LUCAS thereafter filed a motion to dismiss TEPPER's negligence claim, and TEPPER elected not to oppose that motion. Id. The trial judge thus granted it and, in his order, stated that if LUCAS was to be a part of the proceedings "it would have to be based upon a third party action brought by Metropolitan." Id.

METROPOLITAN appealed that decision to the Fifth District Court of Appeal. Id. Just as he elected not to oppose LUCAS's Motion to Dismiss in the trial court, TEPPER elected not to appear or participate in the appellate proceedings in any respect. Id.

The Fifth District ultimately wrote an opinion in which it affirmed the dismissal. Id. In that regard, the appellate panel agreed with METROPOLITAN that its payment did not completely extinguish TEPPER's claim against LUCAS. Id. at 406. Instead, the panel noted that TEPPER would have still had the right to pursue LUCAS for any damages which exceeded the total amount he ultimately recovered from METROPOLITAN. Id. Nevertheless, the court noted that nothing required TEPPER to pursue that claim if he was willing to forego seeking those excess damages, and thus concluded that the trial judge did not err in granting LUCAS's Motion to Dismiss when TEPPER effectively abandoned that claim. Id. at 406–07.

However, the appellate panel did conclude that the trial judge erred in finding that METROPOLITAN could sue LUCAS for subrogation at that time. Id. at 407. The panel looked to the last sentence of section 627.727(6)(b), noting that it "specifically provides that a UM insurer is entitled to seek subrogation against the alleged tortfeasor (and its liability insurer) 'upon final resolution of the underinsured motorist claim.'" Id. The court reasoned that it was not free to disregard clear and unambiguous legislative language, and accordingly concluded that METROPOLITAN could not seek subrogation against LUCAS until it had obtained a final resolution of the underinsured motorist claim. Id.

SUMMARY OF ARGUMENT

The Initial Brief raises two arguments on appeal, both of which lack merit. First, METROPOLITAN asserts that, despite its payment of the amount of LUCAS's liability insurance policy limits, LUCAS should have remained a defendant in TEPPER's lawsuit. However, the Fifth District correctly noted that TEPPER abandoned his claim against LUCAS and that, accordingly, LUCAS was properly dismissed. Specifically, when LUCAS filed a Motion to Dismiss, TEPPER elected not to oppose the request. Furthermore, when the case went to the appellate court, TEPPER chose not to appear or participate in any respect. Accordingly, the Fifth District properly noted that TEPPER had abandoned his claim and, accordingly, it was properly dismissed.

Second, METROPOLITAN contends that it should have been permitted to file a subrogation claim against LUCAS despite the fact that there has not been any final resolution of TEPPER's UM claim. While METROPOLITAN supports that argument with public policy concerns, a litigant's public policy views cannot supplant unambiguous statutory language. In that regard, Section 627.727(6)(b) states, in unambiguous terms, that an insurer may not seek subrogation until after there has been a final resolution of the UM claim. Since that condition has not been satisfied in this case, METROPOLITAN's argument fails.

ARGUMENT

The Initial Brief raises two arguments in an effort to overcome the decision reached by the Fifth District Court of Appeal. This Brief will address each of those arguments in turn, and explain why this Court should reject them and affirm the decision rendered below.

I. The trial judge appropriately dismissed LUCAS from the lawsuit because TEPPER abandoned the claim pending against him.

In its first point on appeal, METROPOLITAN asserts that the tortfeasor — LUCAS — should have remained a defendant in this litigation following its payment of the amount of his liability insurance policy limits. In that regard, METROPOLITAN devotes six pages of argument to a discussion of a UM carrier's right to subrogation under Florida Statute Section 627.727, and the fact that the carrier's payment to preserve that subrogation right does not completely extinguish the tortfeasor's potential liability. That point, however, is not in dispute. Indeed, in the proceedings below the Fifth District stated: "We agree with Metropolitan's assertion that Tepper's acceptance of the $25,000 from Metropolitan did not fully extinguish his claim against Lucas." Metropolitan Cas. Ins. Co. v. Tepper, 969 So. 2d 403, 406 (Fla. 5th DCA 2007).

Instead, the dispositive issue on that point was the appellate panel's conclusion that the dismissal was proper because TEPPER had abandoned his claim. The court stated: "we find the trial court did not err in granting Lucas'

motion to dismiss where Tepper was apparently willing to forego seeking damages in excess of the sum of the limits of Lucas' liability policy and the limits of Tepper's UM policy." Id. at 407. That conclusion is appropriate and should be upheld.

Specifically, and as most recently stated in Russ v. Silbiger, __ So. 2d ___, 33 Fl. L. Weekly D1784 (Fla. 4th DCA July 16, 2008), "the doctrine of waiver encompasses not only the intentional or voluntary relinquishment of a known right, but also conduct that warrants an inference of the relinquishment of a known right."(citing Singer v. Singer, 442 So. 2d 1020, 1022 (Fla. 3d DCA 1983)). For example, in Eagleman v. Korzeniowski, 924 So. 2d 855, 859 (Fla. 4th DCA 2006), the trial judge was presented with a motion for directed verdict at trial. One of the parties, Eagleman, indicated through his counsel that he was not involved with that motion and thus would not be taking a position on the issue. Id. On appeal, however, Eagleman attempted to claim that the trial judge's eventual decision was erroneous. Id. The Fourth District rejected that claim based upon waiver, stating:

> Furthermore, now that the trial court granted the directed verdict post-trial, Eagleman is taking a position on the motion for directed verdict and arguing that granting it was error because it is no longer advantageous to Eagleman. If it was important to Eagleman that a directed verdict be granted (or denied) to resolve the agency issue and remove the risk of any negative impact from the post-trial resolution of that issue, it was incumbent upon Eagleman to seek to secure a ruling on that issue prior to the jury verdict. It defies logic for a party to expect to be

> able to take no position on an issue in the trial court and then take whatever position is most advantageous to it on appeal; a party must take some position below in order for this court to review how the trial court ruled on that position.

Id.(internal citations omitted).

This case presents an even more evident form of waiver. It was TEPPER who sued LUCAS for personal injury damages, yet when LUCAS sought a dismissal, TEPPER elected not to oppose the motion. Metropolitan Cas., 969 So. 2d at 404. That claim abandonment, standing alone, justified the dismissal. See also, Roth v. Roth, 973 So. 2d 580, 592 (Fla. 2d DCA 2008)(when a party fails to present any evidence or make any argument, the trial court is entitled to believe that the claim has been abandoned); Chaiken v. Lewis, 754 So. 2d 118, 119 (Fla. 3d DCA 2000)("We conclude that this point has not been preserved for appellate review because, rather than pressing his argument, plaintiff indicated that he would 'defer to your [the judge's] judgment' on the issue. Having effectively abandoned the point in the trial court, we conclude it is not preserved for appellate review.").

Moreover, this Court has recognized that, when a party fails to present any argument on a potential issue in an appellate brief, that act also operates as a waiver. Shere v. State, 742 So. 2d 215, 218 (Fla. 1999)("Shere did not present any argument or allege on what grounds the trial court erred in denying these claims. We find that these claims are insufficiently presented for review."). In this case,

TEPPER elected not to appear, file any briefs, present any argument, or participate in any other respect in the appeal of his dismissed claim. Id. Accordingly, the Fifth District was warranted in concluding that TEPPER had waived his claim for that reason as well. See also, State v. Mitchell, 719 So. 2d 1245, 1247 (Fla. 1st DCA 1998)(finding that issues raised in an appellate brief which contained no corresponding argument must be deemed abandoned); In re Coleman's Estate, 103 So. 2d 237, 239 (Fla. 2d DCA 1958)(finding abandonment due to a party's failure to file any briefs).

In short, while METROPOLITAN is correct that its payment did not necessarily extinguish TEPPER's claim for excess damages against LUCAS, there is no reason why TEPPER could not decide to voluntarily forego that claim. Indeed, if TEPPER believed that LUCAS was not collectible above and beyond the insurance payment he had already received, he could have readily filed a notice of voluntary dismissal as to LUCAS. The effect in this case is the same. Instead of voluntarily dismissing that claim, TEPPER elected not to oppose LUCAS's request for a dismissal. He waived the claim and, given that fact, this Court should reject METROPOLITAN's argument in Point I on appeal.

II. Section 627.727(6)(b) requires UM insurers to obtain final resolution of the UM claim before they are entitled to seek subrogation.

METROPOLITAN's second argument is its contention that it should be permitted to file a subrogation claim against LUCAS prior to the final resolution of

TEPPER's UM claim. However, that argument is contrary to the plain language of Florida Statute Section 627.727.

Specifically, Section 627.727(6)(b) states, in unambiguous terms:

> If an underinsured motorist insurer chooses to preserve its subrogation rights by refusing permission to settle, the underinsured motorist insurer must, within 30 days after receipt of the notice of the proposed settlement, pay to the injured party the amount of the written offer from the underinsured motorist's liability insurer. **Thereafter, upon final resolution of the underinsured motorist claim, the underinsured motorist insurer is entitled to seek subrogation** against the underinsured motorist and the liability insurer for the amounts paid to the injured party.

§627.727(6)(b), Fla. Stat.(emphasis added). The plain meaning of the emphasized text is that an insurer may not seek subrogation until after there has been a final resolution of the UM claim.

As this Court has repeatedly noted, statutes must be applied in accordance with their plain language. E.g. Overstreet v. State, 629 So. 2d 125, 126 (Fla. 1993); State v. Jett, 626 So. 2d 691, 693 (Fla. 1993). "The legislature is assumed to know the meaning of the words in the statute and to have expressed its intent by the use of those words." Overstreet, 629 So. 2d at 126.

That rule holds true even if the Court were to believe that public policy or other extrinsic factors would create a better result if the statute were to be interpreted differently. Simply stated, "unambiguous language is not subject to

judicial construction, however wise it may seem to alter the plain language." Overstreet, 629 So. 2d at 126. "If the legislature did not intend the results mandated by the statute's plain language, then the appropriate remedy is for it to amend the statute." Id.

For example, in State v. Jett, 626 So. 2d 691, 692 (Fla. 1993), the Court considered the circumstances under which Florida Statute Section 415.512 created a waiver of the psychotherapist-client privilege. While the Court noted that strong policy considerations supported only a limited waiver, the plain language of the statute stated otherwise. Id. at 692–93. Accordingly, the Court held:

> It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language. While the dissent's view below has much to commend it, we find that the decision whether or not to engraft that view into the Florida Statutes is for the legislature. We trust that if the legislature did not intend the result mandated by the statute's plain language, the legislature itself will amend the statute at the next opportunity.

Id. at 693.

In this case, METROPOLITAN presents a pure public policy argument, stating that judicial economy would benefit from its ability to immediately file a subrogation claim. Whether that is true or not, the Legislature has determined otherwise. The Court must presume that, when writing the phrase "Thereafter, upon final resolution of the underinsured motorist claim, the underinsured motorist

insurer is entitled to seek subrogation," the Legislature intended to use the term "thereafter" and the qualifying phrase "upon final resolution" when describing when a UM carrier is "entitled to seek subrogation." The plain meaning of that language is that the final resolution of the UM claim is effectively a condition precedent to the subrogation claim, and it is not until that condition has been satisfied that the insurer may thereafter seek subrogation.

In its Initial Brief, METROPOLITAN describes the intent of the Legislature in enacting Section 627.727(6) as being to encourage settlements and provide compensation to the injured party, and furthermore to prevent potential obstruction of those settlements by recalcitrant insurance companies. Initial Brief at 7. See also, Allstate Ins. Co. v. Rush, 777 So. 2d 1027, 1031 (Fla. 4th DCA 2000); Dominion of Canada v. State Farm Fire and Cas. Co., 754 So. 2d 852, 856 (Fla. 2d DCA 2000). Those same policy goals are advanced by requiring insurers to obtain a final resolution of the UM claim prior to seeking subrogation. Again, the statute will promote settlement of the UM claim, provide the injured insured with compensation, and prevent any lengthy obstruction of those settlements by insurers.

The question of whether those policy goals outweigh the policy goals espoused by METROPOLITAN is not an issue for this Court. "The legislature has the last word on declarations of public policy." American Liberty Ins. Co. v. West

and Conyers, Architects and Engineers, 491 So. 2d 573, 575 (Fla. 2d DCA 1986). In this case, the Legislature made that policy declaration clear through the use of statutory language. Because that language is unambiguous, the Court should simply enforce it as written and "trust that if the legislature did not intend the result mandated by the statute's plain language, the legislature itself will amend the statute at the next opportunity." Jett, 626 So. 2d at 693. Accordingly, the Court should reject METROPOLITAN's public policy argument.

Otherwise, METROPOLITAN's Initial Brief relies almost exclusively upon one sentence taken from the Second District's Opinion in Dominion of Canada v. State Farm Fire and Cas. Co., 754 So. 2d 852 (Fla. 2d DCA 2000). However, the Dominion court was addressing a completely different situation than the one at issue in this case, because in Dominion the insureds had not only abandoned their tort claim, but also had affirmatively abandoned their UM claim before State Farm sought subrogation. That was not a case where the carrier attempted to commingle the two claims, but rather was a situation where there actually had been a "final resolution" of the UM claim prior to the filing of the subrogation suit. Thus, METROPOLITAN's reliance is misplaced.

More specifically, in Dominion Canadian residents Albert and Lucille Mitchel were riding bicycles in Seminole, Florida, when they were struck by an automobile driven by Johnson. Id. at 854. Johnson had motor vehicle liability

coverage with State Farm, and the Mitchels had uninsured motorist insurance issued by Dominion. Id. When State Farm agreed to tender its policy limits to settle the Mitchel's tort claims against Johnson, Mitchels' counsel asked for Dominion's permission to accept the settlement. Id. Dominion elected not to consent, and thus paid the Mitchels the proposed settlement amount in order to preserve its subrogation rights against Johnson. Id.

The Mitchels did thereafter file a lawsuit against both Johnson and Dominion in Canada, but it never served the defendants with a summons or complaint. Id. More importantly, in December of 1995, "**the Mitchels' Canadian solicitor informed Dominion's adjuster that the Mitchels had decided not to pursue their [UM] claim**." Id.(emphasis added). Several years later, in January of 1998, Dominion filed its subrogation suit against Johnson and State Farm. Id. That suit, however, was dismissed by the trial court as untimely filed. Id.

On appeal, Dominion argued that, because Section 627.727(6) uses the phrase "upon final resolution of the underinsured motorist claim" when describing a carrier's right to seek subrogation, its subrogation claim did not actually accrue until that resolution and, therefore, the limitations period also did not begin to run until that event. Id. The Second District rejected that argument based upon longstanding legal principles which have established the accrual dates for both contractual and equitable subrogation rights. Id. at 855–56(citing Attorneys' Title

Ins. Fund, Inc. v. Punta Gorda Isles, Inc., 547 So. 2d 1250 (Fla. 2d DCA 1989); Allstate Ins. Co. v. Metro. Dade County, 436 So. 2d 976 (Fla. 3d DCA 1983); Kala Investments, Inc. v. Sklar, 538 So. 2d 909 (Fla. 3d DCA 1989)). At the conclusion of its decision, the court then stated:

> In our view, the last sentence of subsection (6)(b) is a permissive provision, reflecting the legislature's intention that after an uninsured motorist insurer has paid its insured the amount of the proposed settlement, it is entitled to "seek subrogation." The sentence contemplates that the uninsured motorist insurer would do so after the claimant's uninsured motorist claim is finally resolved. But it does not impose the latter as a condition precedent to the former, nor employ language to the effect that no action for subrogation may be filed until then.

Id. at 856.

That statement, however, was pure dicta. As noted previously, in Dominion there actually had been a final resolution of the UM claim. The insureds, through their Canadian Solicitor, had informed Dominion that they had decided not to pursue any UM benefits. Thus, it was appropriate for Dominion to pursue its subrogation action at that time regardless of the mandatory or permissive nature of the statute's language. The UM claim had been resolved, thus Dominion was thereafter entitled to seek subrogation.

This case is factually different because TEPPER's UM claim against METROPOLITAN has not been resolved. He did abandon his tort claim, but

unlike the insured in Dominion he did not also abandon his UM claim. Accordingly, applying the plain language of Section 627.727(6) to this action, METROPOLITAN cannot yet seek subrogation because there has been no final resolution of that claim.

Notably, an application of the plain language of Section 627.727(6) to the Dominion fact pattern actually leads to a consistent legal result. Because Dominion had obtained a final resolution of its UM claim, it was entitled to seek subrogation. Thus, despite the dicta contained in the Second District's Opinion, the two cases may be factually distinguishable, but their results are entirely consistent in their legal application of the plain language of the statute.

Regardless, and as noted above, this Court must presume that the Legislature knew the meaning of the words it selected. The plain meaning of the phrase "[t]hereafter, upon final resolution of the underinsured motorist claim, the underinsured motorist insurer is entitled to seek subrogation," is that an insurer is not entitled to seek subrogation until after there has been a final resolution of the UM claim. The Court should affirm for that reason.

As a final point, and although METROPOLITAN has not raised any constitutional challenge in its Brief, it is worth noting that the statute's restriction on when a UM insurer becomes entitled to present its subrogation claim is not an invalid procedural regulation. As this Court has recognized, "where a statute

contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail." Massey v. David, 979 So. 2d 931, 937 (Fla. 2008).

For example, in VanBibber v. Hartford Acc. & Indem. Ins. Co., 439 So. 2d 880, 881–83 (Fla. 1983), the Court determined that Section 627.7262 — the nonjoinder of insurers statute — was constitutional despite the fact that it restricted the terms under which individuals could file a lawsuit. The Court noted that the "regulation and supervision of insurance is a field in which the legislature has historically been deeply involved," and that the statute at issue contained both substantive and procedural provisions which, when intertwined, served to further that regulation. Id. at 883.

The statute at issue in this case similarly contains both substantive and procedural aspects. It provides UM carriers with a statutory right of subrogation, and then describes the method for the carriers to pursue that right. Those intertwined provisions are simply part of the Legislature's regulation and supervision of the insurance industry, and its decision to make final resolution of the UM claim a condition precedent to the subrogation action is accordingly constitutional.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision reached by the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this September 11, 2008, this Answer Brief has been e-mailed to e-file@flcourts.org in Microsoft Word format, an original and seven copies have been furnished by U.S. Mail to: **Thomas D. Hall, Clerk, The Supreme Court of Florida**, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1925; and one copy each by U.S. Mail to: **MICHAEL M. BELL, ESQUIRE, MARY GRACE DYLESKI, ESQUIRE,** Attorneys for Petitioner, 2707 East Jefferson Street, Orlando, FL 32803; **JONATHAN ROTSTEIN, ESQUIRE**, Attorney for Respondent, Tepper, 309 Oakridge Boulevard, Suite B, Daytona Beach, FL 32118; and to **CHOBEE EBBETS, ESQUIRE**, Attorney for Appellee/ Defendant, Lucas, 210 South Beach Street, Suite 200, Daytona Beach, FL 32114.

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CERTIFICATE OF TYPEFACE COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210, the undersigned counsel certifies that this Brief is printed in Times New Roman 14-point font.

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