IN THE SUPREME COURT OF FLORIDA

METROPOLITAN CASUALTY
INSURANCE COMPANY,

Petitioner,

v.

ROBERT TEPPER and ANGEL LUCAS,

Respondents.

_____/

CASE NO.: SC07-2428
5DCA CASE NO.: 5D06-3713
FLAGLER
L.T. CASE NO.: 06-497-CA

AMENDED INITIAL BRIEF ON MERITS OF METROPOLITAN CASUALTY INSURANCE COMPANY

MICHAEL M. BELL #458340
MARY GRACE DYLESKI #143383
Bell, Roper & Kohlmyer, P.A.
2707 East Jefferson Street
Orlando, Florida 32803
Tel: 407-897-5150
Fax: 407-897-6947
Attorney for Petitioner Metropolitan Casualty Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE AND OF THE FACTS

Respondent, Robert Tepper ("TEPPER"), was injured in an accident that occurred on May 2, 2006, when the bicycle he was operating collided with an automobile operated by Respondent Angel Lucas ("LUCAS").

At all times material, LUCAS was insured under an automobile insurance policy issued by Allstate Insurance Company, which provided Bodily Injury Coverage.

At all times material, TEPPER was insured under an automobile insurance policy issued by Petitioner Metropolitan Casualty Insurance Company ("METROPOLITAN"), which provided underinsured motorist ("UIM") coverage.

In March 2006, TEPPER filed a two count Complaint against LUCAS and METROPOLITAN in the Circuit Court in an for Flagler County, Florida. In Count I, TEPPER, asserted a negligence claim against LUCAS. In Count II, TEPPER, sought to recover underinsured benefits from METROPOLITAN.

LUCAS' insurance carrier offered to tender policy limits of $25,000.00 in settlement of TEPPER's claim. TEPPER's Counsel advised METROPOLITAN of said offer pursuant to Florida Statute Section 627.727(6). TEPPER's Counsel requested METROPOLITAN grant TEPPER permission to accept the settlement offer. METROPOLITAN did not grant TEPPER permission to accept the settlement offer, but instead paid TEPPER $25,000.00 in compliance with Florida Statute Section 627.727(6), to preserve its subrogation rights against LUCAS.

TEPPER accepted the funds tendered by METROPOLITAN. LUCAS subsequently filed a Motion to Dismiss the Count of TEPPER's Complaint directed to LUCAS. In her Motion to Dismiss, LUCAS argued that TEPPER had "constructively or actually assigned his rights as against LUCAS to METROPOLITAN and it is METROPOLITAN that has the right to sue LUCAS and not [TEPPER]."

Over objection, the Trial Court granted LUCAS' Motion to Dismiss. The Trial Court's Order specifically provided "... if Lucas is to be a part of these proceedings based on the present status of the case, it would have to be based upon a third party action brought by Metropolitan Casualty Insurance Company."

METROPOLITAN filed an appeal of the Order granting LUCAS' Motion to Dismiss to the Fifth District Court of Appeal. On October 19, 2007, the Fifth District Court of Appeal affirmed that portion of the Trial Court's ruling. [ROA 23]. The Fifth District Court of Appeal determined that the Trial Court correctly granted the Motion to Dismiss. The Fifth District Court of Appeal also determined that the Trial Court erred in finding that METROPOLITAN could bring a third party action against LUCAS. The Fifth District determined that METROPOLITAN could not file a third party action against LUCAS for subrogation until "final resolution of the underinsured motorist claim." [ROA 22].

METROPOLITAN filed a Motion for Rehearing, Clarification and/or Certification on November 5, 2007. [ROA 24-41]. By Order of November 28, 2007, the Fifth District Court of Appeal denied METROPOLITAN'S

motion. [ROA 42].

METROPOLITAN subsequently filed a Petition to Invoke this Court's discretionary jurisdiction. [ROA 44]. By Order dated May 8, 2008, this Court accepted jurisdiction of this case. [ROA 45-46]

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal should be reversed, as it incorrectly interpreted Section 627.727(6), Florida Statutes, and affirmed the dismissal of the tortfeasor from the action by the Plaintiff to recover underinsured motorist (UIM) benefits from METROPOLITAN. Nothing in Section 627.727(6)(b) authorizes the dismissal of the tortfeasor from an action to recover uninsured/underinsured motorist benefits, when the underinsured motorist carrier opts to preserve its subrogation right by both refusing to permit settlement between the Plaintiff and the tortfeasor, and paying to the Plaintiff the amount of the proposed settlement.

This Court should also reverse the decision of the Fifth District Court of Appeal, on the grounds that the ruling will promote unnecessary, multiple, duplicative lawsuits to determine the same facts and damages, yielding inconsistent verdicts, and wasting scarce judicial resources.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL, WHICH INCORRECTLY UPHELD THE TRIAL COURT'S DISMISSAL OF THE TORTFEASOR FROM THE UNDERINSURED MOTORIST (UIM) ACTION, WHEN THE UIM CARRIER OPTED TO PRESERVE ITS SUBROGATION RIGHT BY REFUSING TO CONSENT TO SETTLEMENT BETWEEN THE TORTFEASOR AND THE PLAINTIFF, AND SUBSTITUTING ITS FUNDS FOR THE AMOUNT OF THE PROPOSED SETTLEMENT.

The Tortfeasor should remain a party in a personal injury action where the UIM insurer has "fronted" funds pursuant to Florida Statutes

Section 627.727(6)(b) to preserve subrogation.

In 1992 the Florida Legislature amended the uninsured motorist statute as it concerned an insured's right to settle his claim with the tortfeasor.

Florida Statutes, Section 627.727(6)(a)-(b) provides as follows:

> 6(a) If an injured person or, in the case of death, the personal representative agrees to settle a claim with a liability insurer and its insured, and such settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim, then written notice of the proposed settlement must be submitted by certified or registered mail to all underinsured motorist insurers that provide coverage. The underinsured motorist insurer then has a period of 30 days after receipt thereof to consider authorization of the settlement or retention of subrogation rights. If an underinsured motorist insurer authorizes settlement or fails to respond as required by paragraph (b) to the settlement request within the 30-day period, the injured party may proceed to execute a full release in favor of the underinsured motorist's liability insurer and its insured and finalize the proposed settlement without prejudice to any underinsured motorist claim.
>
> (b) 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.

Prior to the 1992 amendment, Florida Statutes, Section 627.727(6) provided:

> If an injured person or, in the case of death; the personal representative agrees to settle a claim with a liability insurer and its insured for the limits of liability, and such settlement would not fully satisfy the claim for

> personal injuries or wrongful death so as to create an underinsured motorist claim against the underinsured motorist insurer, then such settlement agreement shall be submitted in writing to the underinsured motorist insurer, which shall have a period of 30 days from receipt thereof in which to agree to arbitrate the underinsured motorist claim and approve the settlement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release. If the underinsured motorist insurer does not agree within 30 days to arbitrate the underinsured motorist claim and approve the proposed settlement agreement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release, the injured person or, in the case of death, the personal representative may file suit joining the liability insurer's insured and the underinsured motorist insurer to resolve their respective action, the liability insurer's coverage must first be exhausted before any award may be entered against the underinsured motorist insurer, and any such award against the underinsured motorist shall be excess and subject to provisions of subsection (1). Any award in such action against the liability insurer's insured is binding and conclusive as to the injured person and underinsured motorist insurer's liability for damages up to its coverage limits. If an insurer has an arbitration clause in its policy and elects arbitration, the arbitration decision is binding and the insurer has no recourse to civil action.

The obvious intention of the Florida Legislature in enacting what is now law in the State of Florida was to encourage the settlement of an insured's claim against the tortfeasor. The purpose of the amendment was to address the situation in which an injured party was denied immediate access to needed compensation from a tortfeasor's liability carrier when the injured party's UM carrier refused to approve settlement and waive its subrogation rights. Allstate Ins. Co. v. Rush, 777 So.2d 1027 (Fla. 4th DCA 2000)(*citing* Fla. H.R. Comm. On Ins., CS for HB 93-H (1992) Staff Analysis 29 (July 10, 1992)(on file with comm.)). As stated by the Second District Court of Appeal

in Dominion of Canada v. State Farm Fire & Casualty Co., 754 So.2d 852 (Fla. 2nd DCA 2000), when amending Section 627.727, the Florida Legislature resolved the financial dilemma of an injured party whose acceptance of needed settlement funds was precluded by his UM carrier's election to preserve its subrogation rights, and shifted the burden of that election to the insurer. Thus, the amendment serves to provide the injured party with immediate access to compensation when the UM carrier refuses to permit settlement and opts to retain its rights of subrogation. Metrix South v. Rose, 758 So.2d 1259 (Fla. 4th DCA 2000).

The amendment provides that if the uninsured motorist carrier does not consent to the insured's proposed settlement with the tortfeasor and intends to preserve its rights to subrogation, it must pay to the injured party the amount of the proposed settlement.

The amendment to Florida Statutes, Section 627.727(6) contains no provision for the dismissal of a tortfeasor in situations where the uninsured motorist insurer advances the tortfeasor's settlement offer to preserve its right of subrogation. The reason the statute contains no such provision is obvious. In all situations where the insurer has fronted the amount of the tortfeasor's settlement to preserve subrogation, the tortfeasor is responsible to the uninsured motorist insurer for any payment made by the insurer to its insured in satisfaction of the insured's UM claim. Keeping the tortfeasor in the lawsuit, keeps the tortfeasor involved in the process where his ultimate liability to the uninsured motorist insurer will be

quantified.

If the procedure promoted by the Fifth District Court of Appeal is followed, tortfeasors will be dismissed from actions to recover UIM benefits, only to be sued later in separate subrogation actions by uninsured motorist carriers, having had no opportunity to challenge or limit plaintiffs' damages claims. In order to protect their insureds from later subrogation actions with potentially high damage claims, liability carriers will tend to refrain from offering to settle with claimants in the first place, to avoid the procedure of 627.727(6) whereby the UIM carrier advances its funds. Since the purpose of the 1992 statutory amendment was to encourage settlement and facilitate the transfer of at least some compensation to the injured party, such a decision would thwart the purposes of the statute, by discouraging settlement between the tortfeasor and the injured party. In light of the clear legislative intent, Petitioner submits that such a result was not contemplated by the Florida Legislature.

Despite the lack of any provision within Florida Statutes, Section 627.727(6), authorizing the dismissal of a tortfeasor when the uninsured motorist insurer has fronted settlement funds on behalf of the tortfeasor to preserve subrogation, the trial court, without authority from same, determined that TEPPER had "constructively or actually assigned the rights as against LUCAS to METROPOLITAN and it is METROPOLITAN that has the right to sue LUCAS and not [TEPPER]." While the trial court was erroneous in its determination that TEPPER

had made an assignment to METROPOLITAN, the trial court's Order provides that METROPOLITAN could file a third party action in the pending lawsuit against LUCAS, consistent with Dominion of Canada v State Farm Fire and Casualty Co., 354 So.2d 852 (2nd DCA 2006).

In an unpublished decision from the United States Court of Appeals for the Eleventh Circuit, Bodden v. State Farm Mut. Auto. Ins. Co., 195 Fed. Appx. 858, 2006 WL 2519973 (C.A. 11 (Fla.)) 2006)(copy attached hereto as Appendix I), the Eleventh Circuit reviewed a summary judgment entered in favor of State Farm by the United States District Court for the Middle District of Florida (copy attached hereto as Appendix II). The issue before the Eleventh Circuit was similar to that before this Court: Whether Florida law requires a UIM insured to continue to litigate with an underinsured motorist after its UIM carrier has invoked its subrogation rights and paid the insured the amount offered by the underinsured motorist's liability insurer.

As the UIM policy provision required Bodden to name both the underinsured driver and the UIM carrier in the action for UIM benefits, the Eleventh Circuit Court of Appeals specifically noted, "... we see nothing in Florida Stat. Section 727.727(6) that prohibits joinder after payment has been tendered by the insurer as provided in that section." Bodden v. State Farm, 195 Fed. Appx. @ 860. Though not controlling precedent, the Eleventh Circuit Court of Appeals' correct interpretation of Section 627.727(6) demonstrates the error in the Fifth District Court of Appeal's decision in the pending case.

On appeal below, the Fifth District Court of Appeal reasoned that the "trial court did not err in granting LUCAS' Motion to Dismiss where TEPPER was apparently willing to forego damages in excess of the sum of the limits of LUCAS' liability policy and the limits of TEPPER's UM policy. The Fifth District's ruling is error. TEPPER never made the concession that he was willing to forego seeking damages in excess of LUCAS' liability policy and TEPPER's Underinsured Motorist policy. Having invented a concession on the part of TEPPER, the Fifth District Court of Appeal went on to reverse that portion of the trial court's opinion indicating that METROPOLITAN could seek subrogation from LUCAS in a third party action within the pending lawsuit. The Fifth District Court of Appeal based its affirmation of the Trial Court's dismissal of LUCAS on an erroneous conclusion, and its ruling should be reversed.

II. THIS COURT SHOULD ALSO REVERSE THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL ON THE GROUNDS THAT THE RULING WILL EFFECTIVELY THWART THE GOALS OF JUDICIAL ECONOMY, INCLUDING ENCOURAGING SETTLEMENTS AND AVOIDING MULTIPLE, DUPLICATIVE PROCEEDINGS TO DECIDE THE SAME FACTS.

In its opinion, the Fifth District Court of Appeal concluded that METROPOLITAN could "not file a third party action against LUCAS, but, instead must wait to bring a separate action against LUCAS after final resolution of TEPPER's UM claim." [ROA 22].

The Fifth District arrived at this conclusion despite its own observation in Footnote 4 of its opinion as follows:

> We recognize that our decision requiring a separate action does not promote judicial efficiency because, absent settlement, the trial court may well be required to have

> two trials. We also agree that our decision increases the likelihood of inconsistent judgments. However, where legislative language is clear and unambiguous, we are not free to disregard such language. See Macola v Government Employees Ins. Co., 953 So.2d 451, 457 (Fla. 2006); Wagner v Orange County, 960 So.2d 785, 789 (5th DCA 2007).

Despite the Fifth District Court's cursory mention of judicial inefficiency and inconsistent verdicts, Petitioner submits that those critical issues warrant a more in-depth discussion.

As to when a subrogation action can be maintained, the Second District Court of Appeal interpreted Florida Statutes, Section 627.727(6) in Dominion of Canada v State Farm, 754 So.2d 852 (2nd DCA 2000). In Dominion of Canada, the Second District Court of Appeal's opinion provides:

> In our view the last sentence of subsection [627.727](6)(b) is a permissive permission 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 not 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."

Common sense dictates that the tortfeasor remain a party to an action where the underinsured motorist carrier has fronted funds on behalf of the tortfeasor to preserve its right of subrogation. To rule otherwise would encourage multiple lawsuits. In this era of budget cuts and strain upon the court system, it is unreasonable to argue in favor of multiple lawsuits when a single lawsuit will do. See Economy Fire and Casualty v Obenland, 629 So.2d 265 (Fla. 2nd DCA 1993), in which the court pointed out that an uninsured motorist

insurer's subrogation action should not be considered an independent action, since the tort action and the subrogation action are interwoven and damages identical. The Second District noted that it defied common sense to require two separate proceedings and jury trials to decide the same facts and damages. The court further indicated multiple parallel suits for the same relief are a wasteful abuse of resources.

Multiple suits not only result in a duplication of effort, but could also potentially involve inconsistent results. See Attorney Title v. Punta Gorda Isles, 547 So.2d 1250 (Fla. 2nd DCA 1989), which discusses the possibility of inconsistent results in the situation currently before the court. The court verbalized its concern with this inherent problem by noting:

> For example, an insured may sue its own insurance carrier for uninsured motorist benefits and establish that his/her injuries were caused by an uninsured tortfeasor. Since the alleged tortfeasor is not a party to the action, a second jury in the case between the insurance company and the tortfeasor could reach the opposite result. Id.

Not only will the decision of the Fifth District Court of Appeal result in multiple, duplicative lawsuits to determine the same facts, the risk of juror bias against the insurance company exists in both actions, first when the insurance company defends the first party action by the individual plaintiff, and again when the insurance company prosecutes its subrogation action against the individual tortfesor defendant. Moreover, in the scenario advanced by the Fifth District Court of Appeal, the only party that would bear the expense of two separate lawsuits is the insurer, first as defendant against

the injured plaintiff, then as subrogee against the tortfeasor defendant.

Also, the potential for inconsistency raised by the Second District Court of Appeal in the Attorney Title case could not have been the Legislature's intent when it specifically provided insurers with a subrogation action as a means of recovery in Section 627.727(6)(b). The insurers' statutorily created right of subrogation would become meaningless if one jury awards a higher verdict against the insurance company in the first party UIM action, and a separate jury, deliberating the same facts and evidence in a separate action, awards the insurer company a lower amount in its subrogation action.

Keeping the tortfeasor in the UIM action, and resolving the common issues of liability and damages in a single proceeding will promote judicial economy, encourage settlement, avoid piecemeal litigation and yield consistent factual determinations and verdicts.

This Court should reverse the decision of the Fifth District Court of Appeal and issue a ruling that promotes judicial economy and efficiency, which are overriding goals of the judicial system.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fifth District Court of Appeal, and remand this case with instructions that the tortfeasor ANGEL LUCAS is to remain a party defendant in TEPPER's action to recover Underinsured Motorist Benefits from METROPOLITAN.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U. S. Mail this 9th day of July, 2008, to: **Jonathan Rotstein, Esquire,** The Law Offices of Rotstein & Shiffman, LLP, 309 Oakridge Boulevard, Suite B, Daytona Beach, Florida 32118 (386-252-5560 Fax: 386-238-6999); **Chobee Ebbets, Esquire,** Ebbets, Armstrong & Traster, P.A., 210 South Beach Street, Suite 200, Daytona Beach, Florida 32114 (386-253-2288); and **Charles W. Hall, Esquire**, Fowler, White, Boggs & Banker, P.A., Post Office Box 210 St. Petersburg, Florida 33731 (727-896-0601).

S/Michael M. Bell

MICHAEL M. BELL
#458340
MARY GRACE DYLESKI #143383
Bell, Roper & Kohlmyer, P.A.
2707 East Jefferson Street
Orlando, Florida 32803
407-897-5150
Fax: 407-897-6947
Attorney for Petitioner Metropolitan Casualty Insurance Company

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the brief complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P., and is submitted in the Courier New 12-point font.

S/Michael M. Bell
MICHAEL M. BELL
#458340

MARY GRACE DYLESKI #143383
Bell, Roper & Kohlmyer, P.A.
2707 East Jefferson Street
Orlando, Florida 32803
407-897-5150
Fax: 407-897-6947
Attorney for Petitioner Metropolitan Casualty Insurance Company