IN THE SUPREME COURT OF FLORIDA

METROPOLITAN CASUALTY
INSURANCE COMPANY,

Defendant/Petitioner,

CASE NO.: SC07-2428
5DCA CASE NO.: 5D06-3717
FLAGLER
L.T. CASE NO.: 06-497-CA

v.

ROBERT TEPPER and ANGEL M. LUCAS,

Plaintiff/Respondent.
_____/

DEFENDANT/PETITIONER METROPOLITAN CASUALTY INSRUANCE COMPANY'S REPLY BRIEF

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I. DESPITE ARGUMENT TO THE CONTRARY, LUCAS HAS A SIGNIFICANT INTEREST IN THE UNDERLYING LAWSUIT WHICH MANDATES HER PRESENCE.

In her Answer Brief, LUCAS cites the Fifth District's opinion which provides: "Accordingly, 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 limits of LUCAS' liability policy and the limits of Tepper's UM policy". Metropolitan Cas. Ins. Co. v. Tepper, 696 So. 2d 403, 407 (Fla. 5th DCA 2007).

As pointed out in MEOPOLITAN'S Initial brief, there is nothing in the record indicating that TEPPER was willing to forego seeking damages in excess of all available insurance coverage. If the decision of the Fifth District Court of Appeal is affirmed, TEPPER will proceed to trial against METROPOLITAN only and obtain a verdict to be satisfied by METROPOLITAN. If TEPPER obtains a verdict in excess of available UM coverage, TEPPER could proceed against METROPOLITAN for extra-contractual damages pursuant to Florida Statute §624.155.

The argument set forth in LUCAS' Answer Brief, that TEPPER has abandoned his claim against LUCAS misses the mark. METROPOLITAN is entitled to reimbursement from LUCAS (subrogation) for any payment made to TEPPER pursuant to a

settlement or judgment. LUCAS has an interest in TEPPER's ongoing proceedings against METROPOLITAN. Surely, LUCAS would want to participate in the proceedings which will ultimately determine her liability, i.e., the amount she must pay METROPOLITAN to satisfy its subrogation claim. There is simply no reason why LUCAS would not want to be present, and defend her interests.

As a practical matter, LUCAS' defense is being provided by her insurance carrier. It is easy to understand why LUCAS' insurance carrier does not want LUCAS to be present in the underlying case, as her presence would involve expenses for Counsel, experts, costs of litigation, etc. Certainly it is in the best interests of LUCAS' carrier to have LUCAS dismissed from the litigation. But where does this leave LUCAS when METRPOLITAN ultimately seeks subrogation? LUCAS' carrier will indicate that it has already paid its policy limits to protect her interests and it is up to LUCAS to satisfy METROPOLILTAN'S claim which was quantified at a trial where she was not present with Counsel to participate in her defense!

LUCAS' carrier can hardly be said to be acting in good faith and in LUCAS' best interests in suggesting that she should not be a party to the underlying case.

The argument that TEPPER has waived his claim against LUCAS, also misses the mark. Counsel for TEPPER would rather

proceed to trial against only METROPOLITAN for tactical reasons. Surely, any experienced trial lawyer realizes the tactical advantage in proceeding against an insurance carrier as opposed to proceeding against an insurance carrier and an individual like LUCAS. Jury prejudice against insurance carriers could result in a more significant verdict when an insurance carrier is the only Defendant. Protection of LUCAS' interests mandates her participation with the assistance of Counsel.

LUCAS should remain a Defendant in the underlying case where her ultimate liability i.e., METROPOLITAN'S subrogation claim is being quantified.

II. FLORIDA STATUTE §627.727(6)(b) DOES NOT REQUIRE A UM CARRIER TO AWAIT FINAL RESOLUTION OF THE UM CLAIM BEFORE SEEKING SUBROGATION

Florida Statute §627.727(6)(b) provides:

> 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.

The last sentence of Florida Statute §627.727(6)(b) was interpreted by the Second District Court of Appeal in Dominion

of Canada v. State Farm, 754 So. 2d 852 (2nd DCA 2000). In its opinion, the Second District noted:

> In our view the last sentence of subsection [627.727](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."

The United States Court of Appeals for the 11th Circuit also interpreted the last sentence of Florida Statute §627.727(6)(b), consistent with the Second District Court of Appeal in Dominion of Canada. In Bodden v. State Farm Mut. Auto Ins. Co., 195 Fed. Appx. 858, 2006 WL 2519973 (C.A. 11th (Fla.) 2006), the 11th Circuit interpreted Florida Statute §627.727(6) indicating, "… we see nothing in Florida Stat. §627.727(6) that prohibits joiner after payment has been tendered by the insurer as provided in that section". Id. At 860.

Florida Statute §627.727(6)(b), contains no language prohibiting a UM carrier from seeking subrogation in a pending lawsuit. The last sentence is so phrased as a UM insurer's subrogation claim is not quantified until a final resolution of the uninsured motorist claim. Quantification occurs at settlement or when a judgment is executed. The last sentence of

Florida Statute §627.727(6)(b), is nothing more than an acknowledgment that the UM carrier's claim is not quantified until the UM claim has been resolved.

III. AS A MATTER OF PUBLIC POLICY, IT DEFIES COMMON SENSE TO REQUIRE TWO LAWSUITS WHEN ONE WILL DO.

If the decision of the Fifth District Court of Appeal is not reversed, TEPPER will proceed to trial against METROPOLITAN only. As LUCAS will not be party, she will have no opportunity to defend herself to lessen her ultimate liability, i.e., METROPOLITAN'S subrogation claim. If METROPOLITAN cannot come to terms with LUCAS, it will be necessary for METROPOLITAN to file suit against LUCAS to recover on its subrogation claim. LUCAS will likely argue that she is not bound by the jury's determination of TEPPER'S damages which quantified METROPOLITAN'S subrogation claim. LUCAS will ask for a second trial on damages which will likely result in a verdict inconsistent with the jury's determination of TEPPER'S damages in the tort action.

The Fifth District Court of Appeal indicated in footnote 4 of its opinion that LUCAS' absence from the underlying case does not promote judicial efficiency and may well result in two trials with inconsistent judgments. 969 So. 2nd at 407.

LUCAS argues that the Legisature's mandate as set forth in the last sentence of Florida Statute §627.727(6)(b) is clear,

and therefore must be blindly followed. How can it be said the Legislature intended inconsistent results. How can it be said that the Legislature intended two trials when one will do. Surely, the Legislature had no such intention. METROPOLITAN advocates that this Court interpret the last sentence of Florida Statute §627.727(6)(b) consistent with the interpretation of the Second District Court of Appeal and the United States Court of Appeal for the 11th Circuit. No other result makes sense.

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 22nd day of October, 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); and **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., P.O. Box 210, St. Petersburg, Florida, 33733 (Fax: 727-821-1968).

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CERTIFICATE OF COMPLIANCE

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

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