IN THE SUPREME COURT OF PENNSYLVANIA

NO. 406 WAL 2008

FRANK D. HELLER and BEVERLY A. HELLER
Appellants

v.

PENNSYLVANIA LEAGUE OF CITIES AND MUNICIPALITIES t/d/b/a PENN PRIME TRUST a/k/a PENNSYLVANIA POOLED RISK INSURANCE FOR MUNICIPAL ENTITIES, and INSERVCO INSURANCE SERVICES, INC.
Appellee

BRIEF OF THE PENNSYLVANIA ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS FRANK D. and BEVERLY A. HELLER

APPEAL FROM ORDER AND OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED JULY 15, 2008 AT DOCKET #1853 C.D. 2007 DENYING THE APPLICATION FOR REARGUMENT BEFORE THE COURT EN BANC OF THE ORDER DATED JUNE 4, 2008 REVERSING SUMMARY JUDGMENT OPINION OF THE COURT OF COMMON PLEAS OF VENANGO COUNTY, PENNSYLVANIA #2005-00017

FRANK P. MURPHY, ESQUIRE
Attorney I.D. No 25361
43 E. Marshall Street
Norristown, PA 19401
(610) 272-4222
Counsel for Amicus Curiae, Pennsylvania Association for Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICUS CURIAE..... iii

I. STATEMENT OF JURISDICTION 1

II. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW 2

III PROCEDURAL HISTORY 3

IV. STATEMENT OF THE QUESTION PRESENTED 4

V. STATEMENT OF THE CASE 5

VI. SUMMARY OF THE ARGUMENT 6

VII. ARGUMENT 7

VIII. CONCLUSION 13

IX. CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

CASES

Allwein v. Donegal Mutual Ins. Co., 671 A.2d 744, 752 (Pa. Super 1996) 9

Boris v. Liberty Mutual, 515 A.2d 21 (Pa.Super 1986)..12

Craley v. State Farm & Cas. Co., 895 A.2d 530 (Pa. 2006) 12

Hanigan v. WCAB (O'Brien Ultra Service Station), 860 A.2d 632
(Pa.Cmwlth 2004) *appeal denied,* 582 Pa. 712, 782 A.2d 174 10

Harper v. Providence Washington Insurance Company, 753 A.2d 282 (Pa. Super., 2000).......... 9

Kmonk-Sullivan vs. State Farm Mutual Automobile Ins. Co., 788 A.2d 955 (Pa. 2001) 9

Lewis v. Erie Ins., 793 A.2d 143, 152 (2002) 12

Motorists Ins. Cos. v. Emig, 664 A.2d 559, 561, (Pa.Super. 1995)
(citing 75 Pa.C.S.A. Section1791(6) 7

Nationwide Ins. Co. v. Resseguie, 980 F.2d 226, 231 (3d Cir. 1992)..7

Paylor v. Hartford Insurance Co., 640 A.2d 1234, 1235 (Pa. 1994)..8

Prudential Property and Casualty Ins. Co. v. Colbert, 813 A.2d 747 (2002) 9

Selected Risks v. Thompson, 552 A.2d 1382 (Pa. 1989)..11,12

STATUTES/RULES

MVFRL, 75 Pa.C.S.A. §1701 et seq. 7-10,12

75 Pa.C.S.A. §1731 7,8,9,11

75 Pa.C.S.A. §1733 9

75 Pa.C.S.A. §1734 8

75 Pa.C.S.A. §1791 7

Act of July 2, 1993, PL 190, known as Act 44.. 10,11

STATEMENT OF INTEREST OF AMICUS CURIAE

The Pennsylvania Association for Justice is a non-profit organization with a membership of 2,900 men and women of the trial bar of the Commonwealth of Pennsylvania. For more than 30 years the Pennsylvania Association for Justice (formerly Pennsylvania Trial Lawyers Association) has promoted the rights of individual citizens by advocating unfettered right to trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary. The organization opposes, in any format, special privileges for any individual group or entity. Through its Amicus Curiae Committee, the Pennsylvania Association for Justice strives to maintain a high profile in the Commonwealth and Federal Courts by promoting, through advocacy, the rights of individuals and the goals of its membership.

This Amicus Curiae brief is respectfully submitted to the Court to address the public importance of the issues raised by the lower courtøs decision in this matter apart from and beyond the immediate interests of the parties to this case. Should this court choose to adopt the Respondentøs position, the nature of injured workers in Pennsylvania will be significantly changed and the result will be a radical departure from precedential case law. Allowing Insurance companies to exclude UM/UIM benefits to any person receiving workersø compensation benefits is contrary to the theoretical underpinnings of traditional insurance law.

I. STATEMENT OF JURISDICTION

The Amicus Curiae, the Pennsylvania Association for Justice, adopts the Statement of Jurisdiction as set forth in Petitionersø Brief.

II. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The Amicus Curiae, the Pennsylvania Association for Justice, adopts the Statement of the Scope and Standard of Review as set forth in the PetitionersøBrief.

III. PROCEDURAL HISTORY

The Amicus Curiae, the Pennsylvania Association for Justice, adopts the Procedural History as set forth in the PetitionersøBrief.

IV. STATEMENT OF THE QUESTIONS INVOLVED

The question for review is stated in this Courtøs Order of July 7, 2009. That question is:

> Whether or not the Honorable Court should strike down an exclusion in [Respondentøs] policy providing that any person receiving workerøs compensation benefits was ineligible for UM/UIM benefits?
>
> *The question was answered in the negative by the Superior Court.*

V. STATEMENT OF THE CASE

The Amicus Curiae, the Pennsylvania Association for Justice, adopts the Statement of the Case as set forth in Petitionersø Brief.

VI. SUMMARY OF THE ARGUMENT

It is a violation of public policy to exclude from underinsured motorist (UIM) coverage a claim by anyone eligible for workerøs compensation (WC) benefits arising out of the same injury. The trial court did not err in the finding that such an exclusion relied upon by the UIM carrier violated public policy. This is especially true in light of the employer, police departmentøs choice to provide such UIM coverage which it could have otherwise easily excluded, if it so desired, by rejecting such coverage. Instead the UIM carrier sold UIM coverage to the employer with little or no chance of any of the intended users of the coverage, the employees, being able to access the coverage by virtue of an exclusion which eliminates all opportunity to use such coverage.

VII. ARGUMENT

The Appellee failed to provide UIM coverage as required by the *MVFRL, 75 Pa.C.S.A. Section 1731.* Under the MVFRL, insurers who issue motor vehicle liability policies in Pennsylvania are required to offer their customers UM/UIM coverage in amounts equal to the bodily injury limits of the customersøpolices. *Motorists Ins. Cos. v. Emig, 664 A.2d 559, 561 (Pa.Super. 1995)* (citing 75 Pa.C.S.A. Section1791(6)). Indeed, Section 1731 of the MVFRL õmandates that an insurance company cannot issue a policy in the Commonwealth of Pennsylvania unless it provides UM/UIM coverage equal to the bodily injury liability coverage, except as provided in Section 1734.ö *Nationwide Ins. Co. v. Resseguie, 980 F.2d 226, 231 (3d Cir. 1992)*

It is the insured, Sugarcreek Borough, which is given the choice to reject coverage and not the insurerøs option. What is even more obnoxious about the exclusion clause sub judice is the fact that the insurer charged a premium for UIM coverage to an employer, while at the same time excluding all but the least deserving from coverage. The Borough of Sugarcreek is the insured. However, only Borough employees such as Appellant can operate the motor vehicles which are insured by Appellee. The exclusion upon which the Appellant relies excludes those people who have the authority to operate these vehicles. The only conceivable people who might be able to obtain coverage under the insurance scheme as offered by Appellant are criminal suspects who are in the back of police cruisers who are involved in motor vehicle collision wherein the other operator is at fault.

It is submitted that the Commonwealth Court failed to give weight to the intent of the insured. It is abundantly clear that UIM coverage is subject to the insured waiving down coverage amounts *75 Pa. C. S. A. Section 1734* or even rejecting such UIM coverage outright. *75 Pa. C. S. A. Sections 1731 (b), (c).* In the instant case the insured, Sugarcreek Borough, could easily have rejected UIM coverage if it did not wish for its employees to have such coverage. To allow the insurer to exclude a UIM coverage it sold to its insured ignores the facts in the record and violates Public Policy in the following ways: (1) It violates the MVFRL requirement to provide UIM coverage unless rejected by insured, (2) it allows the insurer to charge a premium for coverage that is illusory, when the same result could be obtained by asking the insured to reject coverage which would result in no charge to the employer, and (3) the statutory objectives of cost containment and making the victim whole were both violated.

(1) Statutory Violation of Public Policy [1]

As the majority of the Commonwealth Court below declared :

> Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest. It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in [declaring what is or is not in accord with public policy]. The phrase ‑public policyø has been used also when the courts have interpreted statutes broadly to help manifest their legislative intent. (Internal citations omitted) Citing *Paylor v. Hartford Insurance Co., 640 A.2d 1234, 1235 (Pa. 1994)* (Majority Opinion p. 10)

---

[1] See Dissenting Opinion of the Honorable Judge Friedman wherein she describes the statutory history of not allowing exclusions or reductions of UIM coverage on account of WC benefits. The Dissent further points out that since 1993 the ultimate burden of loss was intended by the legislature to fall on the tortfeasors and the insurers who pay in their stead and not the workerøs compensation carriers of employers. (Dissenting Opinion p. 4)

Clauses in insurance contracts cannot supersede, conflict or be repugnant to statutory law. *Prudential Property and Casualty Ins. Co. v. Colbert*, *813 A.2d 747 (2002)*; *Kmonk-Sullivan vs. State Farm Mutual Automobile Ins. Co.*, *788 A.2d 955 (Pa. 2001)*; *Allwein v. Donegal Mutual Ins. Co., 671 A.2d 744, 752 (Pa. Super 1996)*. The exclusion Appellant inserted in its policy is an impermissible method to prevent what the law requires. 75 Pa. C. S. A. Sections 1731 and 1733 of the MVFRL requires insurers to provide UM/UIM benefits in the event that a tortfeasor has no or inadequate liability coverage. In *Kmonk-Sullivan, supra* (State Farm Insuranceøs attempt to exclude governmental vehicles from the definition of insured vehicles was ruled as against public policy). See also *Harper v. Providence Washington Insurance Company, 753 A.2d 282 (Pa. Super., 2000)* where the Superior Court ruled that a similar exclusion proffered by the insurer which stated:

> We will not pay for any element of õlossö if a person is entitled to receive payment for the same element of õlossö under any workersø compensation, disability benefit, or similar law.

This exclusion was not upheld and the injured party was allowed to make a UIM claim.

The majority below takes great pains to point out that there is no statute specifically prohibiting such an exclusion, therefore, it should be allowed. This ignores the statutory evolution of the MVFRL as outlined in the Dissenting opinion. The statutory history reflects a clear legislative mandates to allow subrogation by a WC carrier against UIM coverage provided by an employer. It is submitted this places the risk and cost containment in the hands of the employer who could control its costs by electing UIM coverages best suited to its needs and also the respective Workerøs Compensation carriers could assess their risks and premium costs by inquiring of its insured employers what other applicable coverages which the employer is paying.

If this exclusion stands, a WC insurer such as SWIF may well feel compelled to consider in its pricing the lost revenue it will no longer receive by way of subrogation, thereby showing the absurdity of Appelleeøs argument that cost containment will be advanced by this exclusion.

(2) Illusory Coverage

One must look at the interplay between the working of UIM claims and Workerøs Compensation claims to discern the absurdity of the Appelleeøs position. This Court and the Commonwealth Court have reaffirmed the absolute nature of a Workerøs Compensation insurerøs rights of subrogation. *Act of July 2, 1993, P.L. 190, known as act 44* It is well-settled law that an employer who provides UIM coverage on its vehicles maintains, through its Workerøs Compensation carrier, a right of subrogation. *Hanigan v. WCAB (O'Brien Ultra Service Station), 860 A.2d 632 (Pa.Cmwlth 2004) appeal denied, 582 Pa. 712, 782 A.2d 174* In the instant case the employer, Sugarcreek Borough, purchased UIM coverage from Appellee. It is also clear that the employer purchased Workerøs Compensation coverage from a different insurer, SWIF, which has a right of subrogation. One could imagine that if the same insurer provided both UIM and WC coverage that a reasonable insurance agent would suggest providing UIM benefits might cost additional premiums for which there will be no added benefit to the injured covered insured, since the WC carrier will be reimbursed by way of subrogation requirement of the MVFRL in WC settings. *See Hannigan, supra* However, when the Appellee sold the policy of insurance to Sugarcreek Borough it was receiving a premium for õUIM coverage,ö yet it excluded everyone likely to receive such coverage, i.e., employees injured in the employerøs work vehicles. The insurer for the Workerøs Compensation carrier SWIF loses any subrogation to which it would be entitled. This is not the intent of the employer, Sugarcreek Borough. If it did not want its

employees to have the benefit of UIM coverage and the privilege of paying for the same, it could just as easily reject such UIM coverage, which is binding on employees. *75 Pa. C. S. A. 1731 (b)* It is also equally clear that SWIFøs loss of subrogation was not the intent of the legislature which specifically enacted Act 44 giving WC carriers rights of subrogation from benefits for which the employer paid premiums.

This Court in *Selected Risks Insurance Co. v. Thompson, 552 A.2d 1382 (Pa. 1989)* held that an UM/UIM exclusion violated public policy if its application results in a windfall to the carrier. The Commonwealth Court below failed to recognize the interplay between premiums charged the insured Sugarcreek Borough, which result in no coverage to its employees, and which the same result could have been obtained for free if the Appellee insurer advised the insured, Sugarcreek Borough that it merely needed to reject coverage for UIM coverage. It is indeed shocking to see the argument of Appellee, Penn PRIME, in its submission to the Commonwealth Court that Sugarcreek Boroughøs decision to purchase UIM coverage with an exclusion which avoided payments to the intended beneficiaries of such coverage as õconsumer choice.ö Why then is it not the duty of this Court to enforce the choice of the consumer, Sugarcreek Borough, which could have elected to reject UIM coverage free of charge, but instead chose to purchase such coverage for its employees, when the UIM carrier simultaneously excluded all of the intended beneficiaries of the purchase. In any other context such chicanery would be deemed an unfair or deceptive business practice. The statement by the majority below in footnote 5 that the exclusion under consideration may still allow for a benefit to the Borough (employees) even if its employees are not deemed disabled and therefore not entitled to workerøs compensation benefits is divorced from reality. If there are no wage losses and medical losses, from a practical standpoint,

compensatory damages are not available. It is respectfully submitted this court has the power to void such exclusionary clauses as void against public policy.

(3) Twin Statutory Objectives Are Undermined By The Exclusion.[2]

The Courts of this Commonwealth have recognized two aspects of statutory interpretation which has been espoused by the legislature. At times these statutory objectives have seemed at odds. Nonetheless, these legislative objectives have never been surrendered to the altar of profit for the benefit of an insurer. This Court succinctly stated the legislative objective of the MVFRL is a õscheme for motorist insurance which has been adjusted to preserve the core remedial aspects, while also promoting, with increasingly greater emphasis, the containment of insurance costs.ö *Craley v. State Farm & Cas. Co., 895 A.2d 530 (Pa. 2006) quoting Lewis v. Erie Ins., 793 A.2d 143, 152 (2002)* . The core remedial aspects of the legislative policy to õmake a claimant wholeö was found in *Boris v. Liberty Mutual*, *515 A.2d 21 (Pa..Super., 1986)*; *Selected Risks v. Thompson*, *552 A.2d 1382 (Pa. 1989)* recognized that WC benefits cover just a fraction of the damages suffered by an injured person. Therefore, any insurance policy exclusion that reduces the remedial coverage available to an injured party, and at the same time increases insurance costs, and also shifts the burden of loss to the employer, all the while being done when the same result could be accomplished by real consumer choice for free, must be a violation of public policy.

---

[2] See Dissenting Opinion of The Honorable Judge Rochelle S. Friedman:

> Of course, if a UIM carrier excludes from its UIM coverage anyone who is eligible for WC benefits, a WC carrier cannot assert a subrogation interest against UIM payments and an employee cannot recover all applicable damages. This defeats the two-pronged public policy of: (1) shifting the burden of paying from WC carriers to UIM carriers where an uninsured or underinsured third party tortfeasor causes a work-related injury; and (2) enabling the employee to recover all applicable damages. (Dissenting Opinion p. 5)

VIII. CONCLUSION

The Pennsylvania Association for Justice respectfully requests that this Honorable Court GRANT Appellantøs petition and strike down an exclusion in Appelleeøs policy providing that any person receiving workersø compensation benefit was ineligible for UM/UIM benefits.

Respectfully Submitted:

BY: /s/ Frank P. Murphy
FRANK P. MURPHY, ESQUIRE
43 E. Marshall Street
Norristown, PA 19401
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I, Frank P. Murphy, Esquire, do hereby certify that I have served two copies of the Attached Brief of the Pennsylvania Association for Justice as Amicus Curiae in Support of Appellant mailed by First Class U.S. Mail Postage prepaid, upon the following:

Joseph J. Liotta, Esquire
1328 Liberty Street
Franklin, PA 16323
Attorney for Petitioners,
Frank & Beverly Heller

Brian P. Gabriel, Esquire
Campbell, Durrant & Beatty PC
555 Grant St., Suite 310
Pittsburgh, PA 15219
Attorney for Respondent

/s/ Frank P. Murphy
____
Frank P. Murphy, Esquire
Attorney for Amicus Curiae
Pennsylvania Association for Justice

Dated: August 18th, 2009